



1998

WESTERN AUSTRALIA
LEGISLATIVE ASSEMBLY

**STANDING COMMITTEE ON
UNIFORM LEGISLATION AND
INTERGOVERNMENTAL AGREEMENTS**

UNIFORM LEGISLATION

Twenty-First Report
In the Thirty-Fifth Parliament

1998

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UNIFORM LEGISLATION

Twenty-First Report
In the Thirty-Fifth Parliament

Presented by:
Hon. K. J. Minson, MLA
Laid on the Table of the Legislative Assembly
on the 9 April 1998

ORDERED TO BE PRINTED

Report of the Standing Committee on

Committee Members

| | |
|------------------------|---|
| <i>Chairman</i> | Hon. K.J. Minson, MLA (Member for Greenough) |
| <i>Deputy Chairman</i> | Mr F. Riebeling, MLA (Member for Burrup) |
| <i>Members</i> | Mr D. Barron-Sullivan, MLA (Member for Mitchell) |
| | Mr E.J. Cunningham, MLA (Member for Girrawheen) |
| | Ms M.R. Holmes, MLA (Member for Southern River) |

Committee Staff

| | |
|---|------------------|
| <i>Clerk to the Committee</i> | Mr Peter Frantom |
| <i>Legal/Research Officer</i> | Ms Melina Newnan |
| <i>Committees' Secretary/Stenographer</i> | Patricia Roach |

Committee Address

| | |
|---------------------------------|---------------------------|
| Legislative Assembly | Contact: Mr Peter Frantom |
| Parliament of Western Australia | Telephone: (08) 9222 7486 |
| Harvest Terrace, PERTH WA 6000 | Fax: (08) 9222 7804 |

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Terms of Reference

On Wednesday 4 August 1993 the Legislative Assembly established the Standing Committee on Uniform Legislation and Intergovernmental Agreements.

On Tuesday, 18 March 1997 the Legislative Assembly re-established the Standing Committee on Uniform Legislation and Intergovernmental Agreements with the following terms of reference:

- (1) That a Standing Committee be established for the duration of the 35th Parliament to inquire into, consider and report on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes involving the Commonwealth, States and Territories, or any combination of States and Territories without the participation of the Commonwealth.
- (2) When considering draft agreements and legislation, the Committee shall use its best endeavours to meet any time limits notified to the Committee by the responsible Minister.
- (3) The Committee shall consider and, if the Committee considers a report is required, report on any matter within three months; but if it is unable to report in three months, it shall report its reasons to the Assembly.
- (4) Each member, while otherwise qualified, shall continue in office until discharged, notwithstanding any prorogation of the Parliament.
- (5) No member may be appointed or continue as a member of the Committee if that member is a Presiding Officer or a Minister of the Crown.
- (6) When a vacancy occurs on the Committee during a recess or a period of adjournment in excess of 2 weeks the Speaker may appoint a member to fill the vacancy until an appointment can be made by the Assembly.
- (7) The Committee has power to send for persons and papers, to sit on days over which the House stands adjourned, to move from place to place, to report from time to time, and to confer with any committee of the Legislative Council which is considering similar matters.
- (8) If the Assembly is not sitting, a report may be presented to the Clerk of the Legislative Assembly who shall thereupon take such steps as are necessary and appropriate to publish the report.
- (9) In respect of any matter not provided for in this resolution, the Standing Orders and practices of the Legislative Assembly relating to Select Committees shall apply.

Chairman's Foreword

This is the twenty-first Report of the Standing Committee on Uniform Legislation and Intergovernmental Agreements.

The Terms of Reference of the Standing Committee allow the Committee to inquire into, consider and report to the Legislative Assembly on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes.

The purpose of this Report is to provide a general overview of the growing trend towards the harmonisation of laws both nationally and internationally. Laws are harmonised to eliminate disparities between States and countries for economic and health reasons. Regulations have an impact on the free movement of goods. The harmonisation of laws aims at eliminating obstacles to trade by encouraging internal convergence of laws in order to achieve the objectives of State export-import policy.

The report discusses the growth of intergovernmental relations and how different federations have developed mechanisms to ensure legislative scrutiny of matters relating to proposed or current intergovernmental agreements and uniform legislation.

In its 10th Report, the Standing Committee stressed the need for parliamentary accountability and scrutiny -

Accountability by the Executive to the Parliament is central to the system of responsible Government. Procedures which allow access to information are essential if Parliament is to perform its role. It is important to remember that Parliament is supreme and the Government of the day serves at the pleasure of Parliament.¹

The need for proper accountability cannot be overstated. Parliament needs to be able to exercise constant and effective scrutiny over Government, and this can only be done by improving its access to information about executive activities. At the same time, the reality of a federal system requires Governments to liaise and develop common policies and laws. Intergovernmental relations depend on consultation, negotiation, bargaining and conflict resolution in such forums as Ministerial Councils. Often this will be done behind closed doors, where the participants can speak freely and openly. The challenge lies in balancing the requirements of accountability with the efficient functioning of intergovernmental relations.

The work of this Standing Committee has been recognized as contributing to the debate and raising awareness of the move towards uniform legislation.

This Committee has recommended procedures to ensure that the Western Australian Parliament is informed of intergovernmental agreements negotiated at Ministerial Councils. Such a procedure would ensure that background material and legislative drafts are tabled in the Western Australian Parliament and would ensure the legislature's role in providing a degree of scrutiny and ensuring accountability to the Parliament by the Executive.

This committee has been looking at the problems posed for parliamentary scrutiny in a time of dynamic change not only nationally, but globally and has proposed minor institutional changes which would allow the Parliament to perform its functions within this changing global

¹ WASCULIA, Western Australian Standing Committee on Uniform Legislation and Intergovernmental Agreements (1995), *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles* Tenth Report, Perth, p. 14.

environment. The Committee believes that its role can be utilised effectively with the proposed Constitutional changes for a Republic.

There is no doubt that we live in a time when the general population becomes frustrated at artificial barriers to the free flow of goods, services and information across our State boundaries. Therefore, the message to legislators is to constantly update legislation and indeed their own attitudes, to see that our laws reflect the desire for good, pragmatic government and the removal of unnecessary barriers.

To that end, this report contains information gained from a number of federations of states in various stages of evolution from Europe and North America and will be of considerable assistance to the Members of the Western Australian Parliament in making relevant changes to our legislation to provide harmony and uniformity without compromising the sovereignty of the State and its ability to safeguard the interest of its citizens.

I thank my fellow Committee Members for their individual and collective contributions to this report and commend the Legal/Research Officer, Melina Newnan, the two Clerks to the Committee, Keith Kendrick and Peter Frantom and the Committee's Secretary/Stenographer, Pat Roach, for their hard work.

HON. K. J. MINSON, MLA
CHAIRMAN

Executive Summary

This, the twenty-first report of the Standing Committee on Uniform Legislation and Intergovernmental Agreements, considers the trends and mechanisms used in a number of federations in dealing with growing demand for the harmonisation of laws this is of particular relevance in Australia especially at this time considering constitutional change to an Australian Republic and the internationalisation of many matters which have been matters within the scope of the jurisdiction of the States but which are now reflected in international Treaties.

Although federal systems differ in structure the trend towards greater harmonisation of laws is common. There is a need to ensure accountability and scrutiny of legislation. Arrangements are being put in place to ensure the accountability to the legislature in some jurisdictions. This Report considers the mechanisms used to ensure accountability and scrutiny of legislation by the legislatures of both National and State Governments in several federations.

Changes with the globalisation of markets in the commercial and financial sector has contributed to demand for the harmonisation of laws not only in the financial and commercial sector but also the harmonisation of standards to ensure goods and services are delivered at an acceptable international standard.

In this era of a global economy an internationally competitive domestic economy is a key factor in determining economic performance and growth potential. Individual governments cannot resist global alliances, but they need to ensure that benefits are harnessed for their citizens. This is being done in Australia through regulations which ensure fair-trading and a pro-competitive regulatory regime.

International trade agreements as well as other international treaties have impacted on State laws and have sometimes lead to national legislation to ensure compliance with international agreements. However, State legislatures have also been active in requiring to be kept informed of international and national agreements and accords which impact on their area of jurisdiction.

A number of jurisdictions have put in place procedures to ensure that State legislatures are informed directly and also represented on national or international committees considering proposed legislative changes or initiatives which affect their area of competence.

State legislatures and State and Regional Governments can actively participate in providing input to proposed legislative measures. The requirements that State legislatures are informed ensures a measure of accountability to the legislature and ultimately the people.

This Committee has made recommendations to ensure that the Western Australian Parliament is informed of intergovernmental agreements negotiated at Ministerial Councils. If adopted, such procedures would require that background material and legislative drafts are tabled in the Western Australian Parliament. This would ensure the legislatures role in providing a degree of scrutiny and the executives accountability to the Parliament.

This Report discusses the federal structure in a number of countries including Australia, Belgium, Germany, Canada and the United States of America as well as the European Union. It then considers the growing trend towards the harmonisation of laws and how this is dealt with in the various federal systems as well as the mechanisms in place to ensure scrutiny and accountability to the Parliament, both National and State.

Chapter 1: Australia

In Australia, increasingly the move towards national scheme legislation has evolved a method of law-making which involves Ministers at Ministerial Councils agreeing on national uniform legislation. Ministers at the Federal and State level have established close contacts and work towards agreement on issues within their portfolios. Ministerial Councils do not regularly report to Parliament after meetings on intergovernmental matters and on proposed national legislation.

Although many parties interested in proposed intergovernmental agreements or proposed uniform legislation are consulted about the proposals, Parliaments are rarely informed. Scrutiny of legislation committees in Australia have expressed their concern that individual Parliaments and their Committees have been effectively excluded from the scrutiny process of much national uniform legislation.²

Increasingly international agreements and treaties have impacted on State laws and have sometimes lead to national legislation. However, State legislatures are not informed of international and national agreements and accords which impact on their area of jurisdiction. In Australia the power to implement treaties is primarily within the authority of the Commonwealth Government.³ There is no established procedure for State Parliaments to be informed and participate in the treaty process.

Chapter 2: Belgium

The Report considers the evolving Federation of Belgium. Belgium is a multi lingual country. Constitutional reforms have extended the internal autonomy of the federated entities, that is, the Communities and Regions and strengthened the jurisdiction of the Federal authority over the implementation of international and supranational law by the federated entities.

Co-operation agreements and conventions are common between entities in the Belgium Federation. Co-operation agreements ensure the working of the Belgian Federation without jeopardising the autonomy of the Regions.

In Belgium both the Federal and Community and Regional Governments can sign treaties. Treaties on matters which are the exclusive jurisdiction of a Community or a Region are concluded by the Government of the Community or Region. Treaties, which appertain to Federal and Community or Regional matters must be assented to by all the Legislative Assemblies concerned. The withholding of assent by any one of the Assemblies, effectively prevents the Federal Government from ratifying the treaty.

The Federal Legislative Chambers, as well as all the Community and Regional Councils in Belgium, must be kept informed on negotiations to revise the treaties and instruments of the European Community. Draft instruments of European secondary legislation, such as regulations and directives, must also be communicated to the Federal and Federated Assemblies.

“Member States” can be represented in the Council of the European Communities by Ministers of their Government or their federated entities. Belgium can be represented by a member of the

² Scrutiny of National Schemes of Legislation: Position Paper, by the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, October 1996, ACT.

³ Section 51(xxix) of the Australian Constitution.

Community of Regional Governments whenever the agenda of the Council includes matters, which fall within the scope of Regional or Community jurisdiction.

Chapter 3: European Union

Harmonisation of laws has been an important element in welding together the European Community. In Europe, as in Australia and other Federations, there have been a number of moves to ensure that business, both in the private and public sector, are able to move across borders.

Parliamentary control of European Union legislative and other activities has been strengthened. Such control can be through the European Parliament, National Parliaments and in some countries Regional Parliaments as well, or through enhanced co-operation between the European Parliament and National Parliaments. The strengthening of democratic accountability over European Union matters, has reinforced the role of the Parliaments of the Union, and maximized their impact.

Treaty amendments provide that all European Commission papers are forwarded to National Parliaments of Member States to ensure that all National Parliaments inform their own State Parliaments.

Chapter 4: Germany

The German federal system more directly allows for the harmonisation of laws. German federalism differs from other federal systems in that, the governments of the German States participate directly in the decisions of Germany as a whole. The States are represented by the State Governments who sit in the Federal Upper House, the Bundesrat. Whenever a provision of a Federal Bill affects State (Länder) organizations or their procedures, the Bill is subject to the consent of the Bundesrat.

A strong characteristic of the German federal system is that the bulk of Federal legislation in Germany is implemented by the States.

The legislature of a State cannot constitutionally bind its Government in the Bundesrat. However, the legislature is informed of matters coming before the plenary session and informed of the outcomes of those plenary sessions. The State legislatures have a Committee on Federal and European Affairs in which matters are discussed.

With the continued process of integration in the European Union (EU) German national legislation is increasingly influenced by regulations approved by the EU. If such legislation primarily affects State legislative jurisdiction, then the Bundesrat has the final say in determining the German position. In cases in which EU regulations mainly affect legislative competencies that belong exclusively to the States, then the head of the German delegation and spokesman within the Council of Ministers in the EU is a State Minister appointed by the Bundesrat.

The Federal Government is under an obligation to give both Federal Legislative Chambers every piece of European Community legislation before the vote in the European Council is taken. The States receive almost every paper from the European Commission from the relevant Federal Ministry.

All the State Parliaments have a Committee on Federal and European Affairs and they try to keep track of what is happening in the Bundesrat, as far as European scrutinising is concerned.

Chapter 5: Canada

Like Australia, Canada is a federation. However, there are significant differences between Australia and Canada, mainly flowing from interpretation of the Canadian Constitution.

The Canadian Constitution is the opposite of the Australian Constitution in this respect -

- In Australia, the powers of the Commonwealth Government are strictly defined, the residue of power is retained by the States; and
- In Canada, the powers of the Provincial Governments are strictly defined, and the residue of power is conferred on the National Government.

Canada is a multi lingual country. Canadian federalism has accommodated the Province of Quebec's difference. Quebec has often opted out of broad intergovernmental agreements. In many areas, Quebec has special arrangements while there is broad uniformity with the rest of the country. There is specific constitutional recognition of the Quebec difference.

The key issues in Canadian federalism today is trying to work out more uniform approaches in the name of efficiency and reducing overlap and duplication. The Canadian Provinces and the Federal Government are under pressure to try and deal with unproductive differences in internal trade. Negotiations in the 1990's have resulted in an Internal Trade Agreement. The Agreement requires the Provinces to try and harmonise as much as possible and to mutually recognize standards and regulations in other jurisdictions.

The harmonisation principle has been institutionalised in the Uniform Law Conference of Canada. The Uniform Law Conference of Canada is a body whose primary objective is to promote uniformity of legislation throughout Canada or the Provinces and Territories. It does so by preparing uniform statutes that it recommends for enactment by the Provinces and Territories and by the Federal Government. The Uniform Law Conference is a creation of the Justice Ministries. There is no equivalent body in Australia.

Unlike Australia which tends to have more formal Ministerial Council meetings Canada has a much more informal system. Ministers of most portfolios do meet from time to time but not regularly. Intergovernmental agreements are negotiated as are multilateral agreements between the Provinces and the Federal Government as well as bilateral agreements between a Province and the Federal Government.

Intergovernmental relations in Canada have been directed at the roles of Federal and Provincial Government responsibilities and how to make them more efficient, effective and accountable and increase intergovernmental co-operation.

The issue of international treaties and trade treaties have been of particular significance in Canada because of the North American Free Trade Agreement (NAFTA). The agreements have involved the Government negotiating in areas of exclusive provincial jurisdiction. The Federal Government may sign agreements in areas of provincial jurisdiction, however they may not be implemented. In such cases Canada is vulnerable to retaliation by the trade partner.

Chapter 6: United States of America

The American system of federalism involves the sharing of governing powers between the National Government and the fifty State Governments. Intergovernmental relations have evolved throughout the history of the nation.

Uniform laws are promoted by a variety of groups and there is intense lobbying. Groups such as the business sector, labour union groups and environmental groups may draft a law addressing particular issues and then urge the States to adopt it.

There is a formal constitutional process for inter-State compacts. The compact process is not used very often, but there is a mechanism for States to establish a compact to deal with various issues.

Legislation may originate in many diverse quarters. Either conceived by a Member, the Member's constituents, either as individuals or a group, who may avail themselves of the right to petition and transmit their proposals to a Member. Similarly, State legislatures may "memorialize" Congress to enact specified Federal laws by passing resolutions to be transmitted to the House and the Senate as memorials. The States may form a coalition against a piece of Federal legislation and lobby Congressmen and Federal Senators in their State for support to vote against the proposal.

The Academy for State and Local Government is an umbrella organisation for seven organisations which represent all State elected officials of the United States. These organisations attempt to influence the way legislation is drafted and passed. The lobbyists of the group monitor legislation to see how it will impact on State and local government. After a Bill is introduced and referred to committee, the organisations work to have some input into the Bill.

The National Conference of State Legislatures (NCSL) arranges meetings and forums for State legislative leaders to discuss federal issues with congressional leaders, cabinet officers, key members of the Administration, and often the President.

The States and the National Government accept that there is a need to harmonise laws and there is a degree of harmonisation because of the informal political process in which the NCSL plays a key role. There are procedures for voluntary harmonisation to be systemised through the Conference of Commissioners of Uniform State Laws which is an association established to consider laws of different States and make recommendations to bring about uniformity in such laws.

International trade agreements have impacted on the States because non-tariff barriers to trade, such as taxes, regulations and subsidies, involve State Government policy. The States have no constitutional right to negotiate directly with foreign countries on provisions that affect the States. However, the States have sought to be included in implementing legislation consultation procedures.

Chapter 7: Conclusions

The scope of government functions in the twentieth century has evidenced considerable diversity. Activities have expanded relating to international relations, the functions of the global economy, the expansion of government social activity and the relative expansion and operation of the legal system.

The expansion of markets from local to domestic and then to the global level have necessitated the harmonisation of laws and regulations connected with a wide variety of issues. In general terms this has meant the standardisation at the local, Australian and world level of regulations and standards, sometimes on a voluntary basis but sometimes through agreements and legislative measures.

Harmonised regulations reflect competitive safeguards which prevent anti-competitive conduct and the misuse of market power in many sectors of the economy.

National harmonisation of laws consists of laws regulating markets these include the following sectors, free movement of capital, free movement and safety of industrial products, competition, social policy, agriculture, transport, audiovisual services, environmental protection, telecommunications, financial services, enterprise law, civil law, customs, tariffs and excise and consumer protection. Also included is the mutual recognition of the professions.

Although Australian States have always moved to standardise laws a new imperative has emerged with the globalisation of the economy and rapid technological change which requires the internationalisation of the Australian economy. Not only has there been standardisation of laws in the public sector but also there have been negotiations and standardisation in the private sector. For example, technical standards allow electronic banking “cards” to be accessed by many systems and systems can access different cards. This has produced an open market for card systems.

Governments have had to adapt to international and social demands on their functions and powers. Formal constitutional amendments is a means to effect change, but federal systems have adapted their distribution of powers and functions to changing circumstances in a variety of ways.

Most federations provide for some form of intergovernmental agreements. Australia and Canada have had a long history of intergovernmental agreements on a wide variety of matters.

This Committee has found that other federations have adopted procedures to ensure State and Regional legislatures are informed and often participate in developing agreements and uniform legislative measures.

The Committee believes that a number of recommended options proposed by this Committee for consideration and discussion will provide useful mechanisms for informing the Parliament on proposed uniform legislative measures. The Committee’s recommended options would also contribute to scrutiny and informed debate on any legislative proposals. The Committee believes that the Parliament’s and this Committee’s input would result in a positive contribution to debate which will be useful to Ministers involved in negotiations on such legislative proposals.

This committee has been looking at the problems posed for parliamentary scrutiny in a time of dynamic change not only nationally but globally and has proposed minor institutional changes which would allow the Parliament to perform its functions within this changing global environment. The Committee believes that its role can be utilised effectively with the proposed constitutional changes for a Republic. The Committee believes now is an opportune time for this Committee or another specifically created Committee to look at what options for Constitutional change should be discussed to benefit the State of Western Australia. Issues that are of particular relevance are the vertical fiscal imbalance and the use of treaty making powers in matters which affect the jurisdictions of the States.

Recommendations

The Committee believes that the best way to promote greater involvement of the legislatures in the development of uniform legislation is through improved information flow between the Minister and the legislature. The Committee makes the following recommendations -

Recommendation One

That all proposals for uniform legislation should be in the form of consultation documents and should be tabled in both Houses of the Western Australian Parliament.

Recommendation Two

That proposals for legislation by Ministerial Councils should be made available within six weeks by the relevant Minister of the Western Australian Parliament to ensure that both Houses have the opportunity to consider the proposal.

Recommendation Three

That an agreed period of time should elapse between a legislative proposal being tabled in both Houses of the Western Australian Parliament and the reconsideration of the proposal by Ministerial Council.

Recommendation Four

That the current practice of providing exposure drafts for uniform legislation to various interest groups should also be made available to the Western Australian Parliament.

Recommendation Five

That consideration be given by Ministers to tabling intergovernmental agreements so that Parliament is informed of any proposed legislative developments.

Recommendation Six

That Ministers refer documents on intergovernmental agreements and proposed uniform legislative measures to the Standing Committee on Uniform Legislation and Intergovernmental Agreements.

Recommendation Seven

That the Standing Committee on Uniform Legislation and Intergovernmental Agreements examine and report on any legislative proposals or initiatives which have resulted from Ministerial Council meetings.

Recommendation Eight

That the Western Australian Government approach the Commonwealth Government with a view to forming a permanent Treaty Council in which each State Parliament has a representative.

Recommendation Nine

That the Western Australian Parliament through the Standing Committee on Uniform Legislation and Intergovernmental Agreements or another specifically created committee look at preferred options for changes to the Australian Constitution from a Western Australian perspective.

Ministerial Response

Pursuant to Standing Order 378(c) of the Legislative Assembly of Western Australia, this Standing Committee directs that the Leader of the House, within three months, or at the earliest opportunity after that time, if Parliament is in adjournment or recess, report to the House as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee.

Chapter 1: Australia

1.1 Introduction

Australia is a constitutional monarchy, a federation and a parliamentary democracy. In 1901 Australia's six States were federated into one nation. The Australian Constitution spells out the powers of each of the federal branches of government.

Australian Governments at a State and Federal level are run according to the Westminster system. This means that there are two houses of Parliament.⁴ At the Federal level the lower house is the House of Representatives and the upper house is the Senate. In Western Australia the upper House is the Legislative Council and the lower House is the Legislative Assembly. In other Australian States the lower house is referred to variously as the Legislative Assembly or House of Assembly. Bills must pass through both Houses to become law.

There are six States and two major Territories⁵ in Australia.

Australia has a parliamentary system involving an Executive Government chosen from and responsible to Parliament. Executive authority is coextensive with legislative responsibilities. As a parliamentary federation, Australia has a principle of parliamentary executive responsibility which requires that the executive is responsible and accountable to its legislature.

1.2 The Constitution

The Australian Constitution established a Commonwealth Parliament to operate within the new federal political system. The States transferred certain powers to the Commonwealth while retaining the residual powers as State responsibilities. The Constitution recognizes the doctrine of the separation of powers by setting out the powers of the main arms of Government in three separate chapters for the legislature, the executive and the judicature, but members of the executive must also be members of the legislature. The Constitution provides the formal authority for the division of legislative responsibilities between the States and the Commonwealth in the Australian federation.

The Australian Constitution confers on the Commonwealth Parliament the powers set out in the Constitution, most of which will be found in sections 51 and 52. The Federal Government has powers over defence, foreign affairs, trade and commerce, taxation, customs and excise duties, pensions, immigration and postal services. The itemised grant of powers includes areas where the Commonwealth Parliament has exclusive powers as well as concurrent powers that is, where both the Commonwealth and State Parliaments have the power to legislate in the same areas.⁶ Other powers are left to the States, but Federal law prevails where there is a conflict over concurrent powers.⁷

⁴ The only exception is Queensland which only has a lower House.

⁵ Both Territories have a uni-cameral system.

⁶ Powers which are held concurrently with the States include taxation (section 51(ii)) even though income tax collection has been exercised exclusively by the Federal Government since 1942.

⁷ Section 109 of the Australian Constitution provides: "When a law of a State is inconsistent with a law of the Commonwealth the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid".

1.3 Parliament and Government

The Commonwealth Parliament is composed of the Queen, represented by the Governor-General, the Senate and the House of Representatives. The Governor-General is appointed by the Queen, on the advice of the Prime Minister.

Parliament is the law-making assembly. The main functions of the Parliament are -

- To provide for the formation of a government;
- To legislate;
- To provide a forum for popular representation; and
- To scrutinise the actions of government.

The Executive Government is responsible to the Parliament.

1.4 The Senate

The Senate is one of the two Houses of the Federal Parliament the other being the House of Representatives. The framers of the Constitution intended that the primary role of the Senate would be to protect the interest of the less populous States in the Federal Parliament by giving equal representation to all States.

The Senate fulfils its role as a check on government by scrutinising bills, delegated legislation, government administration, and government policy in general. It does this through the Senate committee system. Once Bills come before the Senate, they may be referred to Standing Committees for investigation and report. The Senate may also refer other matters to Standing or Select Committees.⁸

The Senate consists of 76 Senators, twelve from each of the six States and two from each of the mainland Territories. It has virtually equal power to make laws with the other House of Parliament, the House of Representatives, except money bills cannot be introduced in this House. It is elected by proportional representation, so that its composition closely reflects the voting pattern of the electors.

Senators for the States serve six-year terms, unless they are appointed by State Parliaments to fill casual vacancies for the balance of the term.⁹

1.5 The House of Representatives

Members of the House of Representatives are elected from divisions containing about equal numbers of voters. There are 148 members of the House of Representatives. The government is formed by the party or coalition of parties that holds a majority of seats in the House of Representatives. The government must resign if it loses this majority.

One of the main responsibilities of a government is to introduce into the Parliament legislative measures.

⁸ A 1990 report of a Senate Select Committee inquiry into the use of agricultural and veterinary chemicals resulted in a national regulatory approach to the use of such chemicals.

⁹ Section 15 of the Australian Constitution.

Most Bills are initiated by the House of Representatives because that is where the majority of Ministers sit. However, the Senate possesses the power to initiate any Bill (other than a money Bill).

1.6 State Governments

With the proclamation of the Commonwealth of Australia on 1 January 1901 the six colonies became States of the Commonwealth.

The powers of the States have been effectively diminished because Federal funding is required for many of the States operations. Apart from income tax collection the States have handed few of their powers over to the Commonwealth, and the States still retain the right to levy income tax. Administrative arrangements do require a great deal of co-operation between the Federal and State Ministers and their respective departments. For example, universities are established under State legislation but are funded by the Commonwealth Government.¹⁰ Some Acts of the Commonwealth Parliament are administered by State Government officials, particularly in the area of live-stock and agricultural produce inspection.

Legislation providing for and regulating local government is made by State Parliaments. A State Minister is responsible for local government. Local governments are given certain powers under State legislation.

1.7 Scrutiny of Legislation

A Bill must be passed by the House of Representatives and the Senate in identical terms before it can become law. Most Bills are initiated by the government and implement government policy. The Senate may pass a Bill without amendment, pass it with amendments (or, in the case of money Bills, request amendments before passing it) or reject it.

Bills are “read” three times during their passage through the Houses.

The Parliament’s consideration of legislation is assisted by reference of Bills to Standing Committees of both Houses but more commonly to Senate Committees. The Senate Committee system substantially increases the ability of the Senate to review Bills. A report may recommend amendments to a Bill, or recommend that the Bill be passed without amendment.

1.8 Accountability of Parliament

The fundamental premise of responsible Government is its accountability to the Parliament and hence the people -

... the representatives who are members of the Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.¹¹

¹⁰ Financial assistance to the States is provided under section 96 of the Australian Constitution. Grants are provided for tertiary education.

¹¹ *Australian Capital Television Pty Ltd v Commonwealth of Australia (No.2)* 1992 108 ALR 577 at 594.

This occurs by providing the forum within which, amongst other things, members publicly debate the issues of the day and exercise constant scrutiny over the Government and its legislative program. However, the procedures for drafting intergovernmental agreements are conducted in a manner that avoids recourse to the Parliament. This failure to bring such matters before the Parliament means that the public exposure and discussion initiated by it does not occur. Accordingly, there are very limited opportunities to improve the legislation.

The increasing number of intergovernmental agreements is a gradual yet significant element in transforming the Westminster system of Government in the Australian Federation. Intergovernmental agreements have been introduced for a variety of reasons. There is however no procedure or opportunity to make Governments more accountable with respect to the creation and implementation of these agreements.

1.9 The Role of Ministerial Councils

Ministers at the federal level establish close contacts with their State counterparts in areas where Commonwealth and State Parliaments have concurrent powers. For example, the Australian Transport Council, a body comprising all Transport Ministers, has worked toward agreement on common road traffic rules across Australia.

Bodies comprising officials and Ministers from Federal, State and Territory Governments and in some instances New Zealand¹² meet and agree to adopt proposals for uniform legislation. These bodies are called Ministerial Councils. Examples of these are the Council of the Australian Governments, (COAG) and the Standing Committee of Attorneys-General (SCAG) and there are many other groups of Ministers.

Ministerial Councils play a major role in the development and oversight of national legislative schemes. Sometimes Ministerial Councils take on a more formal role under national legislative schemes including consideration of proposed legislation, regulations and any future amendments as well as approval of appointments to bodies established to administer the legislation.

Ministerial Councils do not regularly report to Parliament after meetings on intergovernmental matters and on proposed national legislation.

1.10 Intergovernmental Agreements

Intergovernmental agreements are political compacts which represent agreements reached by Executive branches of Government at the Council of Australian Governments (COAG) and/or Ministerial Councils, to a scheme involving the passage of uniform legislation in different jurisdictions. The agreement usually describes the substantive principles upon which the legislation will be based.

Once COAG or the relevant Ministerial Council has approved a proposal in principle for a scheme, the matter is usually referred to a working party for detailed development of the structure of the scheme and drafting of the legislation. After consultation the working party makes recommendations to COAG or the Ministerial Council. This may be a lengthy process.

¹²

Increasingly, New Zealand Ministers are included in discussions, a consequence of closer economic ties between the two countries.

1.11 Historical Background to Uniform Laws

To understand fully the development of uniformity of laws in Australia, it is important to outline the historical context and the reason there has in recent years been a growing demand for uniform laws. It is perhaps important to remember that even before Federation, despite the existence of six different legal systems in Australia, there was a measure of uniformity in the law. This occurred because the British colonists brought with them the English common law and statutes.

In the early days of the Australian colonies much legislation was prepared in the Colonial Office in London and the same provisions were used for several colonies. The Colonial Courts paid deference to the Courts in England and the Privy Council was the common appellate tribunal for all decisions from colonial courts. Even after self-government, statutes were generally copied *verbatim* from English legislation and this continued after Federation. The unifying function of the Privy Council was in part transferred to the High Court of Australia.

1.12 Unification of Laws

The Australian States have enacted uniform laws or similar laws over the years in areas such as consumer laws and companies and securities regulation. However as a result of individual State amendments, these laws became less and less uniform over time. This resulted in demands by industry for a more unified approach to such laws.

Differences in State laws have arisen not only because of political divergence but also from relatively trivial matters such as styles of legislative drafting adopted in each State. There is no agreed uniform style of legislative drafting or terminology between the various jurisdictions.

Globalisation and the need for nations to become economically efficient has led to the harmonisation of laws not only nationally but also internationally.

1.13 Parliamentary Scrutiny

The increasing move towards national scheme legislation has evolved a method of law-making which involves Ministers at Ministerial Councils agreeing on national uniform legislation. It has effectively excluded Parliaments from the scrutiny process of much national uniform legislation.

A curious feature of the current state of affairs is that whilst many parties interested in proposed intergovernmental agreements or proposed uniform legislation are consulted about the proposals, Parliaments are not. Scrutiny of Legislation Committees have expressed their concern that individual Parliaments and their Committees do not have an adequate opportunity to constructively review uniform legislation.

With other (non-uniform) legislation, Committees can point out aspects of Bills that breach the Terms of Reference or point out errors in the legislation. In some cases, the relevant government takes these comments into account and amends the Bill. However, in relation to uniform legislation no changes are permitted.¹³

¹³

Committees are often told that the legislation cannot be varied because it has been carefully worked out by the relevant Ministerial Council and has national significance. They have also been told that, if any amendments were to be made to the legislation, it would put that jurisdiction out of kilter with all the others. This is also the case with subordinate legislation.

1.14 What is Uniform Legislation?

Uniform legislation is legislation which is substantially the same in all or a number of jurisdictions. There are a number of ways of achieving national uniform legislation -

- State Parliaments may refer power to the Commonwealth under section 51(xxxvii) of the Australian Constitution which enables the Commonwealth to legislate on the particular matter. The *Mutual Recognition Act 1992* (Commonwealth), for the mutual recognition scheme for goods and occupations is an example.
- Another method includes the introduction of “mirror” legislation enacted by all jurisdictions in identical terms. An example is the trade practices scheme (Part V consumer protection provisions) of the *Trade Practices Act 1974* (Commonwealth) and the Fair Trading Acts of the States.
- “Co-operative” legislation may be enacted in circumstances where the Commonwealth enacts legislation to the extent of its powers and the States and Territories legislate to cover the remaining matters. For example, the Co-operative Companies and Securities scheme.
- “Template” legislation involves a jurisdiction known as the host jurisdiction, enacting the model legislation and other jurisdictions adopting that legislation. For example, the *Financial Institutions (Queensland) Act 1992*.
- Under “alterative consistent” legislation, a jurisdiction may be permitted to participate in a national legislative scheme by enacting legislation which is consistent with the legislation of the host jurisdiction. For example, the Uniform Consumer Credit Laws in Western Australia.
- “Mutual recognition” is a method of achieving national co-operation. Under this method jurisdictions agree to recognise each others laws, that is, the mutual recognition scheme for goods and occupations provides mechanisms by which goods and services regulated by laws in one jurisdiction will be automatically recognised in all participating jurisdictions.

1.15 Background of the Committee

The Standing Committee was established as a result of recommendations from the Select Committee on Parliamentary Procedures for Uniform Legislation Agreements in 1992. The Select Committee had concerns about the scrutiny of uniform legislation and the implications for Parliament. The charter of the Standing Committee is to inquire into, consider and report on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes.

Specifically, the Standing Committee on Uniform Legislation and Intergovernmental Agreements was established as a result of concerns that -

- Two Queensland Acts [*Financial Institutions (Queensland) Act 1992*; and *Australian Financial Institutions Commissions Act 1992*] which were not available to members of the Western Australian Parliament were incorporated into the law of Western Australia

by Western Australian adopting Bills. The application of laws legislation in Western Australia comprised of three Acts -

- *Financial Institutions (Western Australia) Act 1992*;
 - *Western Australian Financial Institutions Authority Act 1992*; and
 - *Financial Institutions (Taxing) Act 1992*.
- The two Queensland Acts were neither incorporated in, nor appended to, the Western Australian Bills;
 - The model used to achieve uniformity involved the application in Western Australia of Queensland legislation;
 - The Western Australian Parliament was, in effect, delegating some of its powers to the Queensland Parliament;
 - Any amendments to the uniform legislation were to be enacted by the Queensland Parliament;
 - Regulations under the scheme were to be made by the Governor in Council in Queensland; and
 - Appeals on questions of law were required to be initiated in the Queensland Supreme Court, not the Western Australian Supreme Court.

1.16 Conclusion

The powers of the Commonwealth Parliament have increased considerably and the powers of State Governments have effectively diminished. This has come about because the Federal Government has increased its financial powers, particularly with the assumption through legislation in 1942 of sole responsibility for collecting income tax. The States are financially dependent on the Federal Government through its passing on of a proportion of taxation revenue to the States and by the Commonwealth Parliament's funding of State projects like education and road construction through grants made under section 96 of the Constitution.

Section 109 of the Constitution also established the legislative pre-eminence of the Commonwealth Parliament over State Parliaments, by providing that where laws made by State Parliaments conflict with laws made by the Commonwealth Parliament, the laws of the Commonwealth Parliament prevail. Also since 1902 the High Court has generally favoured a wide reading of the powers of the Commonwealth Parliament under the Constitution.

The need for Federal and State Governments to co-operate to ensure efficient provision of services to citizens, as well as the globalisation of the economy has accelerated the demand for the harmonisation of laws. This development towards intergovernmental agreements and uniform legislation has resulted in a reduction in the role of State legislatures and effectively diminished parliamentary scrutiny in Australia.

Chapter 2: Belgium

2.1 Introduction

Belgium is a parliamentary democracy under a constitutional monarch.

Belgium became an independent State in 1830. It evolved rapidly, via institutional reforms, into an efficient federal structure. The first Article of the Belgian Constitution now states -

Belgium is a Federal State made up of communities and regions.¹⁴

The decision-making power in Belgium is no longer exclusively in the hands of the Federal Government and the Federal Parliament. The management of the country now falls to several partners, which exercise their competencies independently in different fields.¹⁵

The redistribution of power in Belgium followed two broad lines. The first concerns linguistic and cultural issues and gave rise to the Communities. The concept refers to the persons which make up the Communities and the language and culture that unites them. Belgium has three Communities based on language, the Flemish Community, the French Community and the German-speaking Community.

The second line of State reforms was inspired by economic concerns, expressed by Regions who wanted to have more autonomous power. This gave rise to the founding of three Regions: the Flemish Region, the Brussels Capital Region and the Walloon Region. To some extent the Belgian Regions are similar to Australian or American States, the German “Länder”, Canadian Provinces or the Swiss Cantons. The country is further divided into ten provinces and 589 communes.

The Belgian Federal Government is responsible for national defence, foreign policy, social security, monetary and fiscal affairs. The three Communities deal with cultural matters, while the three Regions have authority over socio-economic matters.

The Communities and the Regions have substantial financial resources with which to finance the responsibilities allocated to them. From the viewpoint of financial resources, the Belgian Communities and Regions are equivalent to the federated States of America or Australia, the German Länder, the Canadian Provinces or the Swiss Cantons. While their powers to raise tax revenue may be restricted, they are by no means unique in that. Generation of the larger sources of revenue generally stems from the legislative power of the Federation, while public expenditure is broadly a function of the federated authorities.

¹⁴ Belgian Constitution, Article 1.

¹⁵ Belgium has 10 million people, nine parliaments, two federal, seven federalised.

Chart 1 below outlines comparative sources of revenue in federated States.

Chart 1¹⁶

| % | Switzerland (1980) | U.S.A. (1980) | Australia (1981) | Canada (1981) | F.R.G. (1980) | Belgium (1989) |
|--------------------|-----------------------|------------------|---------------------|------------------|------------------|-------------------|
| Own resources | 85.2 | 77.7 | 69.6 | 79.6 | 52.7 | 55.2 |
| Shared tax revenue | - | - | - | - | 17.6 | 44.8 |
| Grants | 14.8 | 22.3 | 30.4 | 20.4 | 29.7 | - |

2.2 Constitutional Reform

Constitutional amendments in 1970 incorporated a series of provisions to protect minorities -

... a new type of special majority Federal law was introduced, defined as “an Act of Parliament passed on a majority vote in each linguistic group in each of the Houses (of Parliament), on condition that the majority of members of each group are present and that total votes in favour within the two linguistic groups attain two-thirds of votes cast”.¹⁷

This requirement applied to matters enumerated in the Constitution which related to the application of the constitutional principles of the structure of Belgium. The constitutional requirement was intended to forestall the passing of laws against the wishes of either of the country's two main communities. It thus required the assent of both French and Flemish linguistic groups in each Legislative Chamber.

To prevent any legislation initiated in either chamber of the legislature “of such a nature as to have a serious effect on the relations between the two major communities being adopted an “alarm-bell procedure” was introduced in Article 54 of the Constitution. The “alarm-bell” is sounded by a motion signed by at least three quarters of the members of one of the linguistic groups and results in the suspension of parliamentary procedure. The Cabinet must give reasoned findings on the motion within thirty days and invite the House before which it was tabled to reach a decision either on those findings or on the Bill. The Cabinet, which is comprised of equal numbers of each linguistic group, will try to reach a consensus solution.

The reforms of 1993 centred around two essential principles. Firstly, extending the internal autonomy of the federated entities and secondly, strengthening the jurisdiction of the federal authority over the implementation of international and supranational law by the federated entities.¹⁸

¹⁶ Alen and Ergec: Federal Belgium after the Fourth State Reform of 1993, Minister of Foreign Affairs, External Trade and Development Corporation, Brussels, March 1994, p.34.

¹⁷ *Ibid*, p.10.

¹⁸ *Ibid*, p.30.

2.3 Federal Houses

The elected members of both Houses of the Federal Legislature, the House of Representatives and Senate are divided into a French language group and a Dutch language group.¹⁹ The principal organ of federal executive power, the Cabinet, contains equal numbers of French-speaking and Dutch-speaking Ministers.

Constitutional reforms in 1993 strengthened the autonomy of the federated entities by introducing directly-elected assemblies. The federal bicameral system, was reshaped. The Senate was transformed into a chamber for debating motions and taking part in the legislative process and the federated entities were provided with representation in this second Chamber.

2.4 The House of Representatives

The House of Representatives is the policy chamber, with sole powers of budgetary and political control of the Federal Government. The two legislative Chambers have equal jurisdiction in matters pertaining to the revision of the Constitution, assent to international treaties and co-operation agreements, legislation organising the structure and functioning of the State and that governing relations between the federal authority, the Communities and the Regions.²⁰

2.5 The Senate

The Senate is the House of Review. As well, the Senate provides representation for the Communities, despite its hybrid composition. It has also been ascribed a major role in preventing and settling conflicts of interest between the federated and federal parliamentary assemblies.²¹

The Senate comprises three categories of Members²²–

- 40 directly-elected Senators: 25 elected by the Dutch electoral college, 15 by the French electoral college;
- 21 community Senators elected by and from within the Community Councils. It is these Senators who hold a plurality of offices - who act as the voice of the Communities in the Senate in matters concerning the revision of the Constitution and the amendment of the laws governing their status. The Flemish community and the French community are each represented by 10 Senators and the German-speaking community is represented by one Senator only; and
- 10 co-opted Senators. They are elected by the directly-elected Senators and the Community Senators of each linguistic group: six by the Dutch linguistic group and four by the French linguistic group.²³

¹⁹ Belgian Constitution, Article 43.

²⁰ *Ibid*, Article 77.

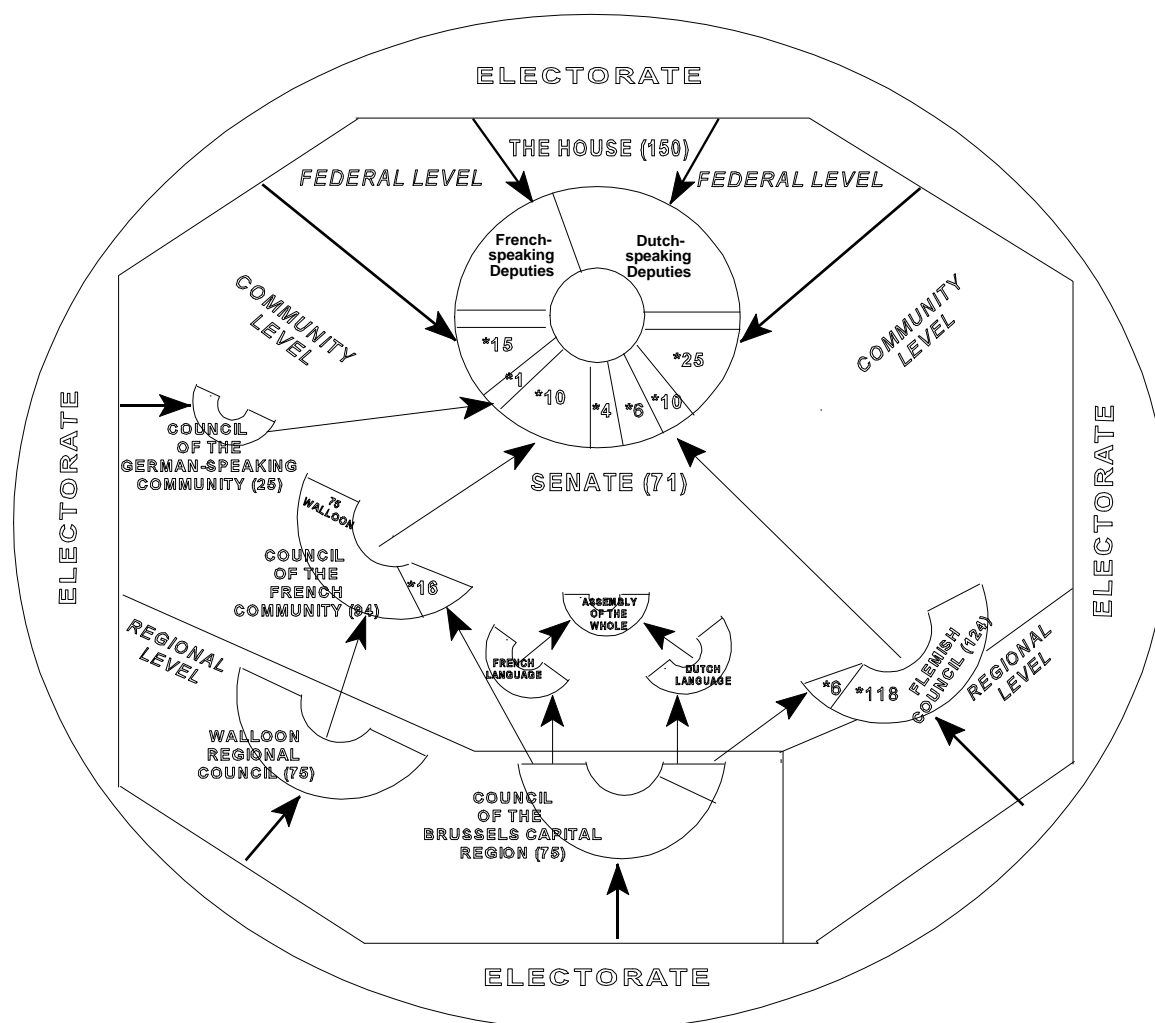
²¹ *Ibid*, Article 143.2.

²² *Ibid*, Article 67.

²³ Alen and Ergec, (1994) *Op Cit*, p.37.

Chart 2 shows the composition of the Assemblies.

Chart 2²⁴



- * 15 Directly elected French-speaking Senators.
- * 1 German Community Senator
- * 10 French Community Senators
- * 4 Co-opted French Senators
- * 25 Directly elected Dutch Senators
- * 10 Dutch Community Senators
- * 6 Co-opted Dutch Senators

2.6 Communities and Regions

The Communities and Regions have a distinct legal personality, having both their own legislative and executive organs as well as legislative power in many areas and financial autonomy.²⁵ However, they do not have their own court systems, nor do they have separate Constitutions, their status being governed exclusively by the Federal Constitution and federal enactments.

Each Community and Region has its own Legislative Assembly (Council), and executive body (Government), the composition and functioning of which are fixed by the Federal Constitution. All the Regional Councils are directly elected for a five-year period.

The Community and Regional Governments are elected by majority vote of their respective Councils.²⁶ While they are accountable to the Council concerned, the Council can only force the Government's resignation by a "constructive motion of no confidence".²⁷

Belgium is divided into four linguistic regions, three communities and three regions. The structure incorporates the necessary guarantees of balance between the two major constituents of the French and Dutch-speaking communities.²⁸

Communitarization was a response to demand from the Flemish movement, which had sought recognition and development of their own language and culture. The 1970 Constitution gave recognition to three "cultural communities" - the French, Dutch and German cultural communities.²⁹

While communitarization was principally a response to Flemish desire, regionalisation sought to address the wishes of the French-speaking part of the country who wanted autonomy over social and economic matters.³⁰

The Communities have responsibility for cultural affairs, education, personalised services and the use of language in certain matters. The Regions have exclusive or partial jurisdiction over land use and planning, the environment and water policy, rural redevelopment and nature conservation, housing, agricultural policy, economic policy, energy policy, employment policy, public works and transport.³¹

²⁵ Alen and Ergec (1994), *Op Cit*, p.24.

²⁶ Belgian Constitution, Article 122.

²⁷ Alen and Ergec, (1994), *Op Cit*, p.27.

²⁸ The division of Belgium into four linguistic regions is enshrined in Article 4 of the Belgian Constitution which was included in 1970.

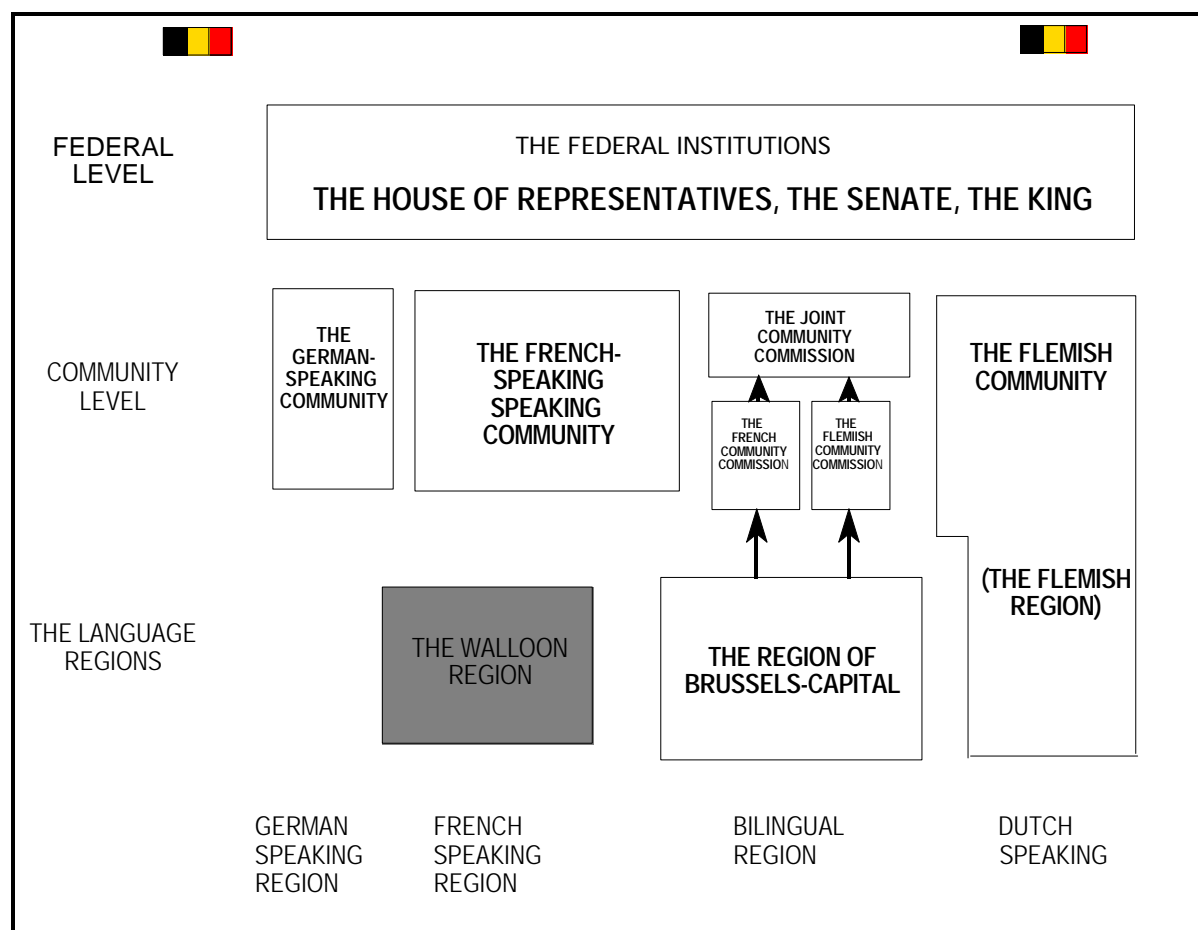
²⁹ Belgian Constitution, Article 2.

³⁰ Alen and Ergec, (1994), *Op Cit*, p.15.

³¹ Belgian Constitution, Article 3, The Regions are: Walloon, Flemish and Brussels Regions.

Chart 3 - outlines the Institutions of Belgium.

Chart 3³²



2.7 The Court of Arbitration

The Court of Arbitration's task is to maintain a balance in the multiform State. The Court has paid particular attention not only to the cohesion of the Belgian State, but also to a liberal interpretation of Community and Regional responsibilities. The Court has emphasised the exclusivity of the jurisdictions allocated in the Constitution, and given a liberal construction of the "rules on the allocation of competences"³³ -

The Court has, for example, held that the (new) structure of the Belgian State is founded in economic and monetary union, "by which is meant that institutional framework of an economy built on constituent units and characterised by an integrated market (so-called economic union) and a single currency (so-called monetary union)".³⁴

³² Alen and Ergec, (1994) *Op Cit*, p.26.

³³ *Ibid*, p.21.

³⁴ *Ibid*, p.21-22.

The Court of Arbitration places a restrictive interpretation of the exceptions to Community and Regional responsibilities reserved to the federal authority. The Communities and Regions may also have jurisdiction over federal matters, including those constitutionally reserved to federal law, where this is “necessary” to the exercise of their powers and responsibilities.

Residual jurisdiction, that is, that jurisdiction not specifically allocated to any authority, still remains vested in the federal authority. However, Article 35 of the Constitution established the principle that residual jurisdiction may be transferred to the Communities or Regions.³⁵

Senator Michel Foret stated -

Belgium has no hierarchy of laws. The Court of Arbitration resolves disputes of whether a Federal/State law is beyond competency. It resolves conflicts between regions and conflicts of interest. For example, the French cultural community funds cultural initiatives which the Flemish community claimed damaged their interest. The Court stopped the procedure. There then was consultation. If agreement still cannot be reached the matter is referred to the Federal Parliament.³⁶

2.8 Federalism

Belgian federalisation constitutes an exception to normal federal practice, which is the quest for unity by voluntary alliance of previously sovereign units. Most Federal Constitutions contain an exhaustive statement on what is to be the federal powers, leaving residual jurisdiction to the federated entities. By contrast Belgian “centrifugal federalism”³⁷ tends rather to enumerate the powers vested exclusively in the federated entities, leaving residual jurisdiction with the federal authority.³⁸

The power of taxation is the only concurrent jurisdiction also shared by the Communities and Regions, meaning that they cannot levy taxes on matters already taxed by the Federal Government. Any community or regional tax may be repealed by a simple-majority federal statute levying a federal tax on the same matter.³⁹

Co-operation agreements ensure the working of the Belgian State without jeopardising the autonomy of the Regions. Co-operation agreements and conventions are concluded between entities in the federation and can operate between Regions.⁴⁰ The Belgian State, its Communities and Regions also have agreements in various areas.⁴¹ The whole Federal Belgian system is full of agreements.

³⁵ Alen and Ergec, (1994), *Op Cit*, p.33.

³⁶ Senator Michel Foret, Leader of the Liberal Party in the Belgium Senate and Member of the Parliament Regional Walloon and the Conseil de la Communauté, Française, meeting, 8 July 1997.

³⁷ “Centrifugal Federalism” means the setting-up of Communities and Regions and slowly turning the unitary State into a Federal State.

³⁸ Alen and Ergec, (1994), *Op Cit*, p.14.

³⁹ *Ibid*, p.19.

⁴⁰ For example, teaching in French and Flemish.

⁴¹ For example, transport, education, justice and health.

The Constitution provides that the Belgian State, Communities and Regions act in the interest of federal loyalty, in order to prevent conflicts of interest.⁴² There are some procedures to prevent conflict between the Parliaments. The Committee of Consultation can decide conflicts between Parliaments.

Inter-ministerial conferences are attended by all respective Ministers, for example, all Finance Ministers can be called to discuss a precise conflict. A recent conflict arose despite all taxation being federal law. The Flemish Government enacted laws on inheritance tax which meant that the owner of a company was free from tax. The Walloon Government disagreed with the law as it would make it easier for companies to set up in the Flemish Region. The Intergovernmental Committee conducted consultation between the Governments and handed down a compulsory agreement between the Governments.

2.9 Treaties

Both the Federal and State Governments can sign treaties. Treaties on matters which are the exclusive jurisdiction of a Community or a Region are concluded by the Government of the Community or Region. The Regional or Community Government concerned must, however, inform the Federal Cabinet that negotiations have been entered into. The Cabinet then has thirty days in which to notify its objections to the proposed treaty, the effect of which is to suspend negotiations. The matter is then referred to the Inter-ministerial Conference on Foreign Policy, which consists of the relevant Ministers of the federated and national governments, who must then reach a consensus within thirty days on whether negotiations should proceed or not.⁴³

Mixed treaties, that is, those which appertain to federal and community or regional matters must be assented to by all the legislative assemblies concerned. The withholding of assent by any one of the assemblies, would effectively prevent the Federal Government from ratifying the treaty.

2.10 European Union

The Federal Legislative Chambers, as well as all the Community and Regional Councils, must be kept informed of negotiations to revise the treaties and instruments of the European Community. Draft instruments of European secondary legislation, such as regulations and directives, must also be communicated to the Federal and Federated Assemblies at the same time as they are transmitted to the Council of the European Communities.⁴⁴

Article 146 of the Treaty of Maastricht allows Member States to be represented in the Council of the European Communities by Ministers of the Governments or their federated entities. The Belgian State can be represented by a member of the Community of Regional Governments whenever the agenda of the Council includes matters, which fall within the scope of Regional or Community jurisdiction.⁴⁵

Such participation by Regional or Community Governments has facilitated the implementation of international rules into Belgian law, especially if matters fall within their jurisdiction and the

⁴² Belgian Constitution, Article 143.

⁴³ Alen and Ergec, (1994), *Op Cit*, p. 30.

⁴⁴ *Ibid*, p. 31.

⁴⁵ *Ibid*, p. 32.

Communities and Regions have the sole powers and responsibility for implementing those rules. However, the principle of the unity of the Belgian State, dictates that the Belgian Government has the sole responsibility for non-conformity of its federated authorities. This has resulted in adverse judgements against Belgium in the Court of Justice of the European Communities for failure to implement European directives. For this reason, reforms in 1993 allow the federal authorities to act in the place and instead of the defaulting Community or Region in complying with an order or judgement pronounced against the Belgian State by an international court or tribunal.⁴⁶

Belgium is a member of the European Union (EU). The European Union speaks with one voice for Member States. The Federal Government represents Belgium and negotiates for Belgium but this is preceded by intergovernment, inter-Parliamentary negotiations. Regions are invited to participate. Communities can only sign treaties which are regional.⁴⁷

2.11 Conclusion

Belgian public law recognizes a variety of forms of co-operation between the Belgian State, the Communities and the Regions such as: reciprocal representation in management and decision-making bodies, co-operation agreements, consultation procedures, and inter-Ministerial conferences comprised of members of the Federal Government and those of the Governments of the Communities and Regions.

Since co-operative federalism can lead to the marginalization of parliamentary control and a rise in the responsibilities of the executive branch, constitutional reforms in 1993 addressed this potential development by increasing the participation of the parliamentary assemblies, by whom the majority of co-operation agreements must be endorsed.

The Belgian federal system is characterized by three dominant features -

- Its centrifugal nature - that is the Communities and Regions have acquired an increasing degree of autonomy;
- Its bipolar nature - such mechanisms and techniques as the linguistic group in the Federal Parliament, the special-majority federal laws, the “alarm-bell procedure”, and the equal composition of the Cabinet and absence of any federal political parties; and
- Its territorial nature and a predominance of regional entities.

These elements of the Belgian system are based on an interlocking set of balances.

Along with the diversity of the constituent units, there is a sense of belonging to one nation. There is a duty of allegiance to the Federation by the Federal State and the federated entities in the Constitution.

⁴⁶ *Ibid*, p. 32.

⁴⁷ For example, vocational training.

Chapter 3: European Union

Harmonisation of laws has been an important element in welding together the European Community. In Europe, as in Australia and other federations, there have been a number of moves to ensure that business, both in the private and public sector, are able to move across borders. A key reform has been in relation to mutual recognition legislation.⁴⁸ Another key element has been in the recognition of business entities constructed in another jurisdiction.

3.1 Introduction

From its inception in 1957, the European Community has shown a constant expansion from the original six members to a total today of 15, with applications for membership already being considered from countries in eastern and central Europe and in the Mediterranean area. The founding members, Belgium, France, Germany, Italy, Luxembourg and the Netherlands, were joined in 1973 by Denmark, Ireland, and the United Kingdom. Greece joined in 1981, Spain and Portugal in 1986 and Austria, Finland and Sweden in 1995. The European Union (EU) could face enlargement to embrace as many as 25 members or even more, early in the new century if negotiations are successful.

The European Union is a federation of three separate communities governed as an aggregate by a single institutional system of intergovernmental organisation, legitimised by a procession of treaties. The system came to fruition in 1951 with the founding Treaty of the European Coal and Steel Community (ECSC). The Treaty of Rome in 1957 created the European Economic Community (EEC) and the European Atomic Energy Community (Eurotom).

The Maastricht Treaty (1993) expanded the Union's impetus from economic and monetary unification, to mutual recognition of a common foreign and security policy, and co-operation in the fields of judicial and home affairs.

The European Union has numerous political and economic objectives. The European Union's executive arm, the Commission makes proposals to the Council based on what is in the best interest of the Community as a whole. The Union's executive powers are a force in relation to the enforcement of internal competition laws within the organisation. The Commission focuses on -

... keeping restrictive practices and market dominance within bounds; setting limits to or prohibiting State subsidies; discouraging discriminatory tax practices, etc.⁴⁹

The Maastricht Treaty also made provisions for the development of a single European market, which was one of the Union's original objectives. The single market would fulfil the promise of the Rome Treaty by knocking down all tariff and regulatory barriers to the free movement of goods, capital and people (labour) within Europe and thus help the continent compete against Asia and America.

⁴⁸ The Sixth Report of this Committee recommended the adoption of the *Mutual Recognition Act 1992* (Commonwealth) by the Western Australian Parliament. See Western Australia, Legislative Assembly, 1994, Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Mutual Recognition: A Consideration of the Mutual Recognition Scheme*, Sixth Report, tabled on Wednesday, 28 September 1994.

⁴⁹ Noel, E, *Working Together - the Institutions of the European Community*, 1993, Luxembourg; Office of Official Publications of the European Community.

The EU is a legalistic union based on treaties. The latest treaty is the Amsterdam Treaty. The EU is seen as a pooling of sovereignty by all Member States.

3.2 The European Commission

The European Commission operates at the very heart of the European Union. Its role as the source of policy initiatives is unique. The Commission works in close partnership with the other European institutions and with the governments of the Member States. Although the Commission makes proposals, all the major decisions on important legislation are made by the Ministers of the Member States in the Council of the European Union, after taking account of the advice of (or, in some cases, in co-decision with) the democratically elected European Parliament.

The Commission's job is to ensure that the European Union can attain its goal of an ever-closer union of its peoples. A principal task is to ensure that goods, services, capital and persons can move freely throughout the territory of the Union. It must see to it too, that the benefits of integration are balanced between countries and regions, between business and consumers and between different categories of citizens.

The Commission's role includes proposing legislation and ensuring that the objectives laid out in the Treaties of Rome and Maastricht are adhered to. It is the only institution that can initiate legislation.⁵⁰ Draft proposals are drawn up by the Commission, before being formally adopted as legislative proposals by the College of Commissioners.

3.3 Functions of the Commission

The Commission fulfils three main functions -

(1) *Making proposals for new legislation*

The Commission has the right to make proposals for legislation but they must go to Council.

The Commission consults widely with interested parties from all sectors and all walks of life when preparing draft legislation. It also takes account of the prevailing economic, political and social realities.

In its initiatives, the Commission takes the principle of subsidiarity into account so that it initiates legislation only in areas where the European Union is better placed than individual Member States to take effective action.

Once the Commission proposal has been submitted to the Council of Ministers and the European Parliament the three institutions work together to produce a satisfactory result.

⁵⁰

Although, it is the Commission that has the power to initiate legislation, the European Parliament (in the form of Parliamentary Resolutions) the Council of Ministers will often mandate the Commission to formulate a proposal in a particular area. In addition, the European Council, as part of its role of providing a political forum for discussion of future EU policy, will often invite the Commission to present proposals on specific issues to the Council of Ministers.

(2) *Guardian of the EU*

The Commission acts as the guardian of EU Treaties to ensure that EU legislation is applied correctly by the Member States and that all citizens and participants in the single market benefit from the level playing field.

Where necessary, it takes action against those in the public or private sector who fail to respect their treaty obligations. It can, for instance, institute legal proceedings against Member States who fail to introduce EU directives, bring them before the European Court of Justice where they do not comply voluntarily.

The Commission is responsible for vetting subsidies paid by national governments to their industries and authorizing State aid in cases where this is allowed under Community law. In serious anti-trust cases, the Commission can impose fines on companies found guilty of breaking the strict Union rules.⁵¹

(3) *Managing Policies*

The Commission is the executive body of the Union responsible for implementing and managing policy. Among its executive functions is managing the Union ECU 80 billion annual budget and running its Structural Funds, whose main purpose is to even out economic disparities between richer and poorer parts of the Union.

In some areas like competition, agriculture and trade policy, the Commission has considerable autonomy to take decisions without submitting proposals to the Council of Ministers, either because of its specific powers under the Treaties or by delegated authority from the Council.

It also negotiates trade and co-operation agreements with outside countries and groups of countries on behalf of the Union.

3.4 The Commissioners

The Commission as a political body has the 20 Commissioners (or Members of the Commission). The members of the Commission are drawn from the 15 EU countries, but each one swears an oath of independence, distancing himself or herself from partisan influence from any source. The Commissioners are men and women who have generally sat in national parliaments or the European Parliament or who have held high office in their home countries, often at Ministerial level, before coming to the EU.

The Commission meets once a week to adopt proposals, finalize policy papers and take other decisions required of it. Decisions are taken where necessary by a majority vote; when a decision has been adopted, it becomes Commission policy.

The President of the Commission is chosen by EU Heads of State or Government meeting in the European Council. The presidential choice has in practice to be endorsed by the European Parliament. The other 19 members of the Commission are nominated by the governments of the

⁵¹

It imposed an ECU 248 million fine, the highest ever, on a group of firms found guilty in late 1994 of running an illegal market-rigging cartel.

15 Member States in consultation with the new Commission President. The President and his colleagues are subject to parliamentary approval by means of a collective vote of investiture before they can take office.

The system of parliamentary vetting of the President and his colleagues, instituted by the Treaty on European Union, does much to reduce criticism that the Commission was an unelected body without democratic legitimacy. It gives Parliament a full voice in the choice or appointment of the Commission President and his colleagues. Previously, its only powers in this context (which it retains) was to force the resignation of the whole Commission through a vote of censure.

Two commissioners come from each of the big Member States (Germany, Spain, France, Italy and the United Kingdom) and one from each of the smaller ones (Belgium, Denmark, Greece, Ireland, Luxembourg, the Netherlands, Austria, Portugal, Finland and Sweden).

3.5 The European Parliament

Since 1979 the European Parliament has been elected directly via universal franchise by each State using its own electoral system. Most States use a non-compulsory proportional representation system.

There are elections every five years for the European Parliament by all members of all Member States. In some countries members of the European Parliament are also members of the State Parliament. There is an increasing role for the European Parliament.

3.6 Council of the European Union

The Council of the European Union is the key institution. The Council, whose members are the Ministers from Member Governments, and (in many instances) the European Parliament as well, is responsible for decisions on EU policies and priorities.

The Council is made up of representatives from the Government of the 15 Member States, usually the foreign Minister. The Presidency of the Council rotates between the Member Governments at six-monthly intervals, and usually meets approximately three times a year. The proportion of votes each Member State is allocated under Article 148 EEC, is calculated on the basis of population levels and economic strength. When the Council meets to review Commission proposals, the national point of view of each Member is stressed, until a common position is reached. The Council is assisted by a Permanent Representatives Committee. Its main task is to prepare the ground for Council meetings.

3.7 The Court of Justice

The Court of Justice ensures the implementation of the Treaties is in accordance with the rule of law. It is composed of 13 judges appointed for six year terms. These judges are assisted by six advocates-general and in addition a Court of First Instance, which consists of 10 judges also appointed for six year terms.

3.8 The Legal System

The most important aspect of the Union's legal system in relation to uniform legislation is Article 189 EEC. It outlines five forms of legal Acts -

... each with a different effect on the Member States' legal systems; some are directly applicable in place of national legislation, while others permit the progressive adjustment of that legislation to [Union] provisions.⁵²

The five legal Acts are the Regulation, the Directive, the Decision, Recommendations and Opinions.

The **Regulation** is binding and is directly applicable to each Member State.

The Regulation substitutes European law for national law and is therefore the most effective legal instrument provided for by the Treaty.⁵³

The **Directive** is binding to any Member for which it is addressed, but allows the Member State to choose the "form and instruments" necessary for complying with it.

The **Decision** is binding on the addressees it indicates, whether they are individuals or Member States. It takes effect via communication rather than publication in the Official Journal.

Opinions and **Recommendations** are non-binding instruments which enable the Union to assess a current situation or certain facts and suggest a certain line of conduct.

It is the binding Acts (the Regulation, the Directive and the Decision) that constitute Union law -

It ensures from the Treaty and the constant decisions of the Court of Justice that this law has precedence over national law, even the constitutional law, of the Member States, whether it predates or postdates [Union] legislation. In fact, the Member States have definitively transferred sovereign rights to the Community they created, and they cannot subsequently go back on that transfer, through unilateral measures which are incompatible with the concept of the [Union].⁵⁴

Union law therefore cannot be invalidated by one Member State.

Legislation is mainly generated from Member States. Member States have representatives who agree on the agenda for Ministers. Legislation is agreed to by Ministers.

The Commission initiates legislation, the Council adopts the common position and the Parliament approves or amends procedure.

3.9 Transparency in the European Union

The issue of transparency was emphasised as Sweden and Finland prepared to enter the EU. These countries have a history of tight parliamentary control. They insisted that their Governments advise their respective Parliament on all matters.

⁵² Moussis, N. 1994, *Access the European Union: Institution and Policies*, 1994, 4th Ed. Edit-Eur, Pty Ltd. p.38.

⁵³ *Ibid*, p.38.

⁵⁴ *Ibid*, p.39.

The principle of transparency is now in the Treaty. This includes -

- openness;
- prior information; and
- public access to documents.

3.10 Parliamentary Scrutiny

Since the Maastricht Treaty, the European Union has evolved in a truly political direction and Member States have demanded more democratic accountability.

These issues have also been considered by the European Parliament which has resulted in a number of developments including the establishment of the Conference of European Affairs Committees (COSAC), the holding of European Parliament/National Parliaments' sessions in Rome, and greatly increased contacts between the National Parliaments and the European Parliament. The future role of National Parliaments was also discussed at the Intergovernmental Conference (IGC).

Members of the National Parliaments of the Member States have participated in discussions to consider the need for all parliaments of the Union to co-operate in order to increase the democratic quality of decision-making of the Union. They were of the view that no European Union legislation should be adopted without adequate parliamentary participation and control.

3.11 Relations between the European Parliament and National Governments

[There has been a demand by the public] ... for decision-making within the European Union to take place as close as possible to the citizen and for the European Union to become more open and democratically accountable in its decision-making process and administrative culture.⁵⁵

The European Union Committee on Institutional Affairs considered that the decision-making processes were far too secretive and non-transparent. The EU Committee recommended a number of measures to improve the co-operation between Parliaments which included strengthening the role of the European Parliament and reinforcing national parliamentary scrutiny of EU issues. Measures adopted at the European level now facilitate national parliamentary scrutiny. The Conference on European Affairs Committees (COSAC) recommended the national Parliaments give "a period of at least four weeks for examining all proposals of relevance to the legislative process". Most committees of the European Parliament are now open, and National Parliamentarians can take part in European Parliament Committee discussions.

The EU Committee considered that National Parliaments should be given a period of time to consider Green and White Papers as other organisations were usually given a deadline by the Commission to comment on these papers. They stated -

Why not give National Parliaments a similar deadline?⁵⁶

It also recommended that -

... National Parliaments should be kept fully informed, and be given an opportunity to express their views, when substantial changes are made to a text in the course of legislative procedure. The

⁵⁵ Neyts-Uyttebroeck, Annemie, European Parliament, Session Document, Report on the Relations between the European Parliament and national parliaments, Committee on Institutional Affairs, 22 May 1997, p 4.

⁵⁶ *Ibid*, p.19.

European Parliament should seek to promote the maximum openness as regards progress in conciliation under the co-decisions procedure ...⁵⁷

The EU Committee recommended use be made of electronic transmission of Commission and other EU documents and suggested a two-way transmission of documents, in order to promote exchange of views and information between parliaments of the Union and the EU institutions.

The EU Committee supported -

... co-operation between the European Parliament and national parliaments on a variety of levels, such as by joint meetings of national and European Parliament committees in the same field, bilateral committee meetings, and meetings between respective rapporteurs and between representatives of corresponding political groups⁵⁸

As representatives of the peoples of the Union, the National Parliaments and the European Parliament have a key role to play in the exercising of democratic control over the European Union's legislative and other activities. The EU Committee recognised the -

... need to strengthen parliamentary control of European Union legislative and other activities, whether through the European Parliament, through national parliaments (and in some countries regional parliaments as well) or through enhanced co-operation between European Parliament and national parliaments. ...⁵⁹

3.12 Amsterdam Treaty

The Treaty of Amsterdam was signed in September 1997 in Luxembourg. The Treaty proposed a number of measures including improving and simplifying matters in the field of judicial co-operation in civil matters and promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.⁶⁰

The Treaty strengthens provisions on police and judicial co-operation in criminal matters. The Treaty also endorses the principles of subsidiarity and proportionality. It confirms that the Community shall legislate only to the extent necessary. Community measures should leave as much scope for national decisions as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty.⁶¹

The Treaty also provided that Member States should inform and consult one another within the Council on any matter of foreign and security policy of general interest in order to ensure that the Union's influence is exerted as effectively as possible by means of concerted and convergent action.⁶²

⁵⁷ *Ibid*, p.8.

⁵⁸ *Ibid*, p.9.

⁵⁹ *Ibid*, p.10.

⁶⁰ Draft Treaty of Amsterdam, Brussels, 19 June 1997, p.19.

⁶¹ *Ibid*, p.91.

⁶² *Ibid*, p.102.

The Treaty also makes provisions to ensure decision making processes are as open as possible and provides for access to European Parliament, Council and Commission documents.⁶³

3.13 Role of National Parliaments

The Draft Treaty of Amsterdam addresses the role of National Parliaments in the European Union. Chapter 19 proposed that -

- All Commission consultation documents (green and white papers and communications) shall be forwarded to National Parliaments of the Member States.
- Commission proposals for legislation be made available in good time so that the government of each Member State may ensure that its own National Parliament receives them.
- A six-week period is to elapse between a legislative proposal and the date when it is placed on the Council agenda for decision.
- The Conference of European Affairs Committee (COSAC) may examine any legislative proposal or initiative in relation to the establishment of an area of freedom, security and justice which might have a direct bearing on the rights and freedoms of individuals.
- COSAC may address the European Parliament, the Council and the Commission on the legislative activities of the Union.⁶⁴

Chapter 19 of the Draft Treaty provides that all papers need to be forwarded to Member States to ensure that all National Governments inform their own Parliaments. There is a six week period within which the legislative proposal is made available and the date is placed on the Council paper. The Act or decision and all Commission consultation documents are also made available.

3.14 Anti-fraud - European Union and Member States

The fight against fraud is primarily the responsibility of the Member States, nevertheless, the Commission plays a part in coordinating and intervening in areas involving transnational frauds and large financial crimes. A common set of legal rules have been enacted to combat fraud in all areas covered by Community policies.

The Community has taken action in its fight against fraud. The Commission has reported -

Transnational frauds necessitate the cross-checking of information and subsequent launch of operations which is most usefully done at the Community level. The creation of "task groups" in sensitive sectors, with contact points in the Member States, allows a better assessment of the risks and of the threats posed by organised crime. Privileged access to intelligence, full use of all investigative competencies and targeted action on the ground are essential to counter the actions of organised financial crime.⁶⁵

⁶³ *Ibid*, p.94.

⁶⁴ *Ibid*, p.140.

⁶⁵ Commission of the European Communities, Protection of Community Financial Interests, Fight Against Fraud, Annual Report, 1996, Brussels, 1997, p 2.

The Commission adopted an integrated approach to fraud fighting and for combatting major crime in the Union, by integrating all components including improving “intelligence” and analysis, involvement with relevant agencies, tougher Community legislative framework and harmonisation of criminal laws of the Member States.⁶⁶ The Community approach has been one of partnership, both with judicial authorities specializing in combatting financial crime and with traditional enforcement authorities (police forces of various kinds, customs, revenue authorities, business supervisory authorities, courts and so on).⁶⁷

The Dublin European Council called for a comparable global strategy for combatting international organised crime in general.⁶⁸

The Community has found -

These criminal networks possess impressive organizational skills and can call on substantial resources and facilities as well as a structure which links various national territories both within and outside the Community.⁶⁹

The European Parliament established a committee of inquiry in 1996. The Committee of Inquiry reported in 1997. It considered that there was a need to establish a common law enforcement area, particularly in serious fraud cases involving organised criminal networks. According to Parliament, although legal co-operation exists in theory, in practice structures in the Member States differ widely. A major obstacle was the lack of standards of evidence. The differences between the administrative and legal systems in force in Member States were exploited by criminals.⁷⁰

3.15 Australian/European Union Relations

In spite of distance, Australia and Europe have common goals. They are like-minded partners in areas such as -

- trade and investment;
- bilateral co-operation;
- interest in Asia/Pacific; and
- open stable trade.

Europe is a single entity and has a single trade policy.

Agreements between the European Union and Australia have been concluded in a number of areas including -

- Mutual recognition of tests and certifications;
- Veterinary standards;
- Customs;

⁶⁶ UCLAF is the Commission’s central operational anti-fraud unit.

⁶⁷ Commission of the European Communities, (1997), *Op Cit*, p.6.

⁶⁸ *Ibid*, p.5.

⁶⁹ *Ibid*, p.22.

⁷⁰ *Ibid*, p 40.

- Education & Training;
- Environmental policy; and
- Competition.

There is co-operation to strengthen dialogue and employment.

Chapter 4: Germany

4.1 Introduction

The Federal Republic of Germany (Bundesrepublik Deutschland) is a democratic and social Federal State.⁷¹ Its national and political life is controlled by the Federation (the central authority) and the 16 States (Länder). The German Constitution, the Basic Law⁷² regulates the joint functioning of the Federation and the States in legislative, judicial and administrative matters. The legislature is bicameral. The Bundesrat is the institution that links the Federation and the States. Historically, Germany developed from a number of different German territories and only became a national State through the establishment of the Prussian-dominated empire of 1871. After the second world war period Germany was re-established as a federal system and the States were given a stronger position.

At the time of German unification on 3 October 1990, the five Länder (States) which had made up the former German Democratic Republic (East Germany) joined the Federal Republic under Article 23 of the Basic Law.

The Federal Republic of Germany has a two-tiered system, the Federation and the Länder. Local government is part of the Länder.

4.2 The Constitution (The Basic Law)

The Basic Law, upon which Germany's national order is based has five permanent constitutional organs -

- The Federal President is the Head of State, elected by the Federal Assembly (Bundesversammlung);⁷³
- The Bundestag (the Federal Parliament) consist of directly elected representatives. Its primary function is legislative;⁷⁴
- The Federal Government consists of the Federal Chancellor, who is elected by the Bundestag, and the Ministers of the various Ministries;
- The Bundesrat (or Council of Constituent States), is the States Chamber;⁷⁵ and
- The Constitutional Court guards the basic rights guaranteed by the Constitution and ensures compliance with constitutional provisions.

There is no provision for referendums at federal level. Amendments to the Basic Law require a two-thirds majority of the Bundestag and the Bundesrat.

⁷¹ Basic Law, Article 20.

⁷² The Basic Law has 182 Articles, divided into 14 sections, and is introduced by a preamble.

⁷³ The President's term of office is five years.

⁷⁴ The lower Chamber, the Federal Diet (Bundestag), has 672 members, directly elected for a four-year term.

⁷⁵ The upper Chamber, the Federal Council (Bundesrat), has 69 members appointed by the Länder for variable terms.

Each Land⁷⁶ (State) within the Federal Republic has its own Constitution, which must, however, conform to the principles laid down in the Basic Law. All Länder, districts and parishes have a representative assembly. The exercise of governmental powers is the concern of the Länder, in so far as the Basic Law does not otherwise prescribe. Where there is incompatibility, Federal law overrides Land law. This is similar to section 109 of the Australian Constitution.⁷⁷

Article 72 subsection (1) of the Basic Law provides -

Where concurrent legislation is concerned, the Länder has the right to legislate as long as and to the extent that the Federation has not exercised its legislative powers.

Subsection (2) defines these conditions and provides -

The Federation has the right to legislate on such matters if and to the extent that the creation of equal living conditions throughout the country or the maintenance of legal and economic unity makes federal legislation necessary in the national interest.

There is a trend in the area of concurrent legislative power for matters to be replaced by Länder legislation. Despite the large influx of federal legislative power since 1949 in the area of concurrent powers, the Länder have pursued a number of substantial exclusive powers in which the Federation has no say at all. For example, education is a matter for the Länder, and everything that relates to local government is entirely a matter for the Länder.

In certain enumerated powers in the Constitution the Federation can set the framework for the exercise of the legislative functions of the Länder. The Länder is subject to framework legislation.⁷⁸ Framework legislation is similar to directives in the European Union. Directives are directed at the Parliaments of the Member States to fill in the frame.⁷⁹

4.3 Federation

A strong characteristic of the German federal system as a whole is that on several occasions in the Constitution it is for the Länder to implement federal law. Unlike the United States system of dualism, in which federal authorities implement federal law and State authorities implement State law, the bulk of legislation in Germany is implemented by the Länder. There are only a few branches of specialised administration of the Federation.

Most legislation is passed at the federal level while the Länder is the main administrator. Although the Federation has the most legislative power, the impact of the Länder on federal legislation through the Bundesrat, the second Chamber is not inconsequential, because the Länder is represented by the State Governments who sit in the Bundesrat and have a say in federal legislation.

⁷⁶ "Das Land" is the singular, and "die Länder" is the plural for Land(s) or State(s).

⁷⁷ Section 109 of the Australian Constitution provides "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

⁷⁸ Article 75 of the Basic Law on the area of federal framework legislation provides: Subject to the conditions laid down in Article 72 the Federation has the right to enact framework legislation for the Länder on - (it catalogues seven areas).

⁷⁹ This is different to secondary European legislation, (ordinances or regulations of the Commission and of the Council of Ministers) which is directly applicable to citizens of the Member States.

The system of federalism in Germany is mainly a system of intergovernmentalism. This means that the Legislature of a State cannot constitutionally bind its Government in the Bundesrat. That does not mean that the legislature does not have the right to be informed on everything that happens in the Bundesrat. The legislature is informed of matters coming before the plenary session and informed of the outcomes of those plenary sessions. The legislature has a Committee on Federal and European Affairs in which matters are discussed.

4.4 The Bundesrat

The participation of the Bundesrat in the political process of the Federation is an expression of the distribution of power as well as the checks and balances in the German federal system.

German federalism differs from other federal systems in that the governments of the German States participate directly in the decisions of the Federal Republic as a whole. This participation is through the Bundesrat, which has three central functions -

- It represents the interests of the States at federal level and, indirectly, at the level of the European Union;
- It incorporates the political ideas and administrative experience of the States in federal legislation and administration and in European Union matters; and
- Like the other federal institutions, it bears responsibility for the Federal Republic of Germany as a whole.

In the exercise of these functions the Bundesrat helps shape federal policies as a counterweight to the Bundestag and the Federal Cabinet, but at the same time is also a link between Federal and State Governments.

The Bundesrat is composed of members of state governments. Having a seat and voice in State Government is the prerequisite for membership in the Bundesrat.

The Bundesrat is a governmental chamber which means that only the governments of the Länder are represented, so that the opposition in the Länder legislatures are not represented in the Bundesrat.

The Bundesrat is a permanent body that changes as State elections take place. The number of votes that a State has in the Bundesrat depends on the State's population. No State has fewer than three votes.⁸⁰ The Bundesrat has a total of 68 members and the same number of votes.

The votes for each State must be cast *en bloc*. Every individual State Government must reach an agreement on the issue at hand before voting takes place in the Bundesrat. The members are bound by the decision taken by their State Governments.

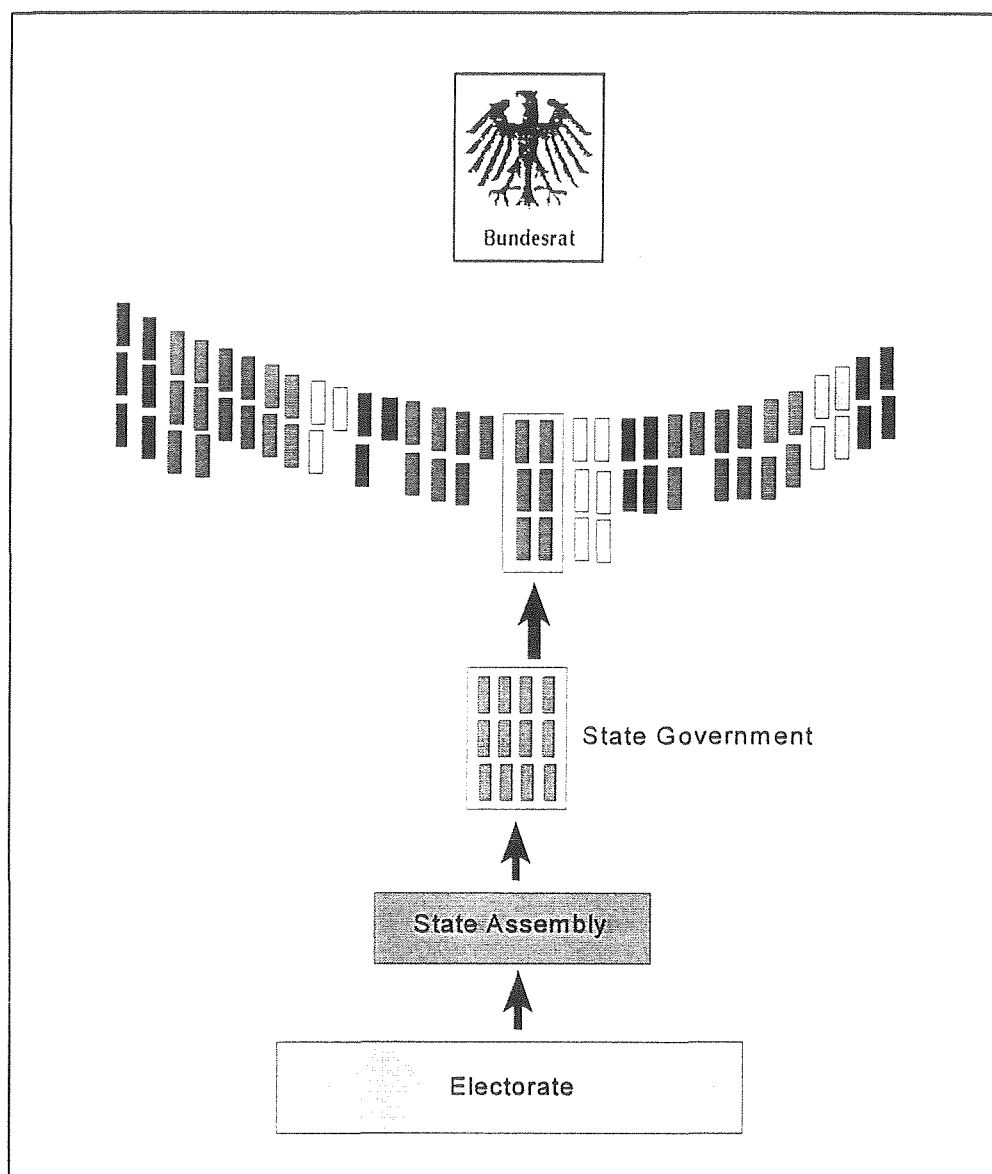
The States have equal access to the presidency of the Bundesrat. The Premier of a different State is elected President of the Bundesrat for one year on a rotational basis. The person elected holds the office of Bundesrat President in addition to his office as Minister-President of his State. The President's main duty is to convene and chair the plenary sessions of the Bundesrat. He represents the Federal Republic of Germany in all Bundesrat matters.

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States with a population of between two and six million have four votes, States with a population of between six and seven million have five votes, and States with a population more than seven million have six votes.

Chart 4 below sets out the organisation of the Bundesrat.

Chart 4⁸¹



4.5 The Bundestag

The Federal Assembly (Bundestag) is the Lower House. Its members are elected for a term of four years.

The Bundestag elects its President and draws up its Standing Orders. Most decisions of the House require a majority vote. Its meetings are public, but the public may be excluded by the decision of a two-thirds majority. Upon the motion of one-quarter of its members the Bundestag is obliged to set up an investigation committee.

⁸¹

Bundesrat: The German Federal Council (Bundesrat), Bundesrat Public Relations Office, Bonn, p.19.

4.6 The Federal President

The Federal President (Bundespräsident) is elected by the Federal Convention (Bundesversammlung), consisting of the members of the Bundestag and an equal number of members elected by the Land Parliaments.⁸² The candidate who obtains an absolute majority of votes is elected, but if such majority is not achieved by any candidate in two ballots, whoever receives most votes in a further ballot becomes President. The President's term of office is five years. Immediate re-election is admissible only once. The Federal President must not be a member of the government or of any legislative body or hold any salaried office. Orders and instructions of the President require the counter-signature of the Federal Chancellor or competent Minister, except for the appointment or dismissal of the Chancellor or the dissolution of the Bundestag.

The President represents the Federation in its international relations and accredits and receives envoys. The Bundestag or the Bundesrat may impeach the President before the Federal Constitutional Court on account of wilful violation of the Basic Law or of any other Federal law.⁸³

4.7 The Federal Government

The Federal Government (Bundesregierung) consists of the Federal Chancellor (Bundeskanzler) and the Federal Ministers (Bundesminister). The Chancellor is elected by an absolute majority of the Bundestag on the proposal of the Federal President.⁸⁴ Ministers are appointed and dismissed by the President upon the proposal of the Chancellor. Neither the Chancellor nor the Ministers may hold any other salaried office. The Chancellor determines general policy and assumes responsibility for it, but within these limits each Minister directs his department individually and on his own responsibility. The Bundestag may express its lack of confidence in the Chancellor only by electing a successor with the majority of its members; the President must then appoint the person elected.⁸⁵ If a motion of the Chancellor for a vote of confidence does not obtain the support of the majority of the Bundestag, the President may, upon the proposal of the Chancellor, dissolve the House within 21 days, unless it elects another Chancellor within this time.⁸⁶

⁸² Article 54 of the Basic Law.

⁸³ *Ibid*, Article 61.

⁸⁴ *Ibid*, Article 63.

⁸⁵ *Ibid*, Article 67.

⁸⁶ *Ibid*, Article 68.

4.8 The Legislation of the Federation

A distinction is made between fields within the exclusive legislative powers of the Federation and fields within concurrent legislative powers. In the field of concurrent legislation the Länder may legislate so long and so far as the Federation makes no use of its legislative right. The Federation has this right only in matters relating to the creation of equal living conditions throughout the country and in cases where the preservation of legal and economic unity is perceived to be in the national interest. Exclusive legislation of the Federation is strictly limited to such matters as foreign affairs, citizenship, migration, currency, copyright, customs, railways, post and telecommunications. In most other fields, as enumerated,⁸⁷ concurrent legislation exists.

The legislative organ of the Federation is the Bundestag, to which Bills are introduced by the government.⁸⁸ After their adoption they must be submitted to the Bundesrat, which may demand, within three weeks, that a committee of members of both Houses be convened to consider the Bill.⁸⁹ The Bundesrat may veto a law within two weeks. This veto can be overruled by the Bundestag, with the approval of a majority of its members. If the Bill requires the consent of the Bundesrat, such an overruling may not take place.

Whenever a provision of a Federal Bill touches on upon Länder organizations or their procedures for implementation, it is subject to the consent of the Bundesrat.⁹⁰ The need for the consent of the Bundesrat does not have anything to do with the question whether it is an exclusive power or a concurrent power it is decided on the content of the Bill regarding the implementation of the Act. This is not the case with an objection Bill which means that the Bundesrat can raise objections after attempting a compromise in the Mediation Committee but then the Bundestag, the first chamber, can override that objection with an absolute majority.

4.9 Bills initiated by the Bundesrat

The Bundesrat is the second legislative body. Like the Bundestag and the Federal Government, the Bundesrat has the right to introduce Bills. The Bill is sent to the Federal Government for comment who is required to forward the Bill to the Bundestag.

⁸⁷ *Ibid*, Article 74.

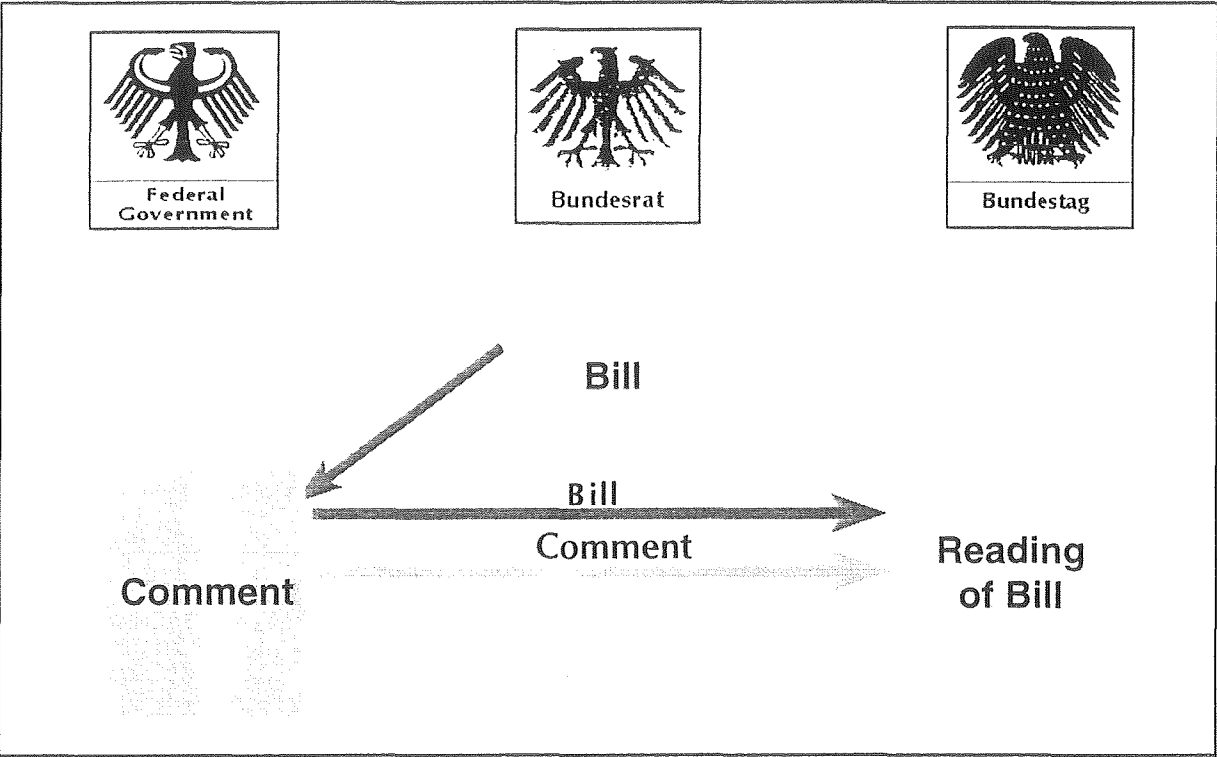
⁸⁸ *Ibid*, Article 76.

⁸⁹ *Ibid*, Article 77.

⁹⁰ About 55 to 60 per cent of all Bills are subject to the Bundesrat's consent.

Chart 5 outlines the process for Bills initiated by the Bundesrat.

Chart 5⁹¹



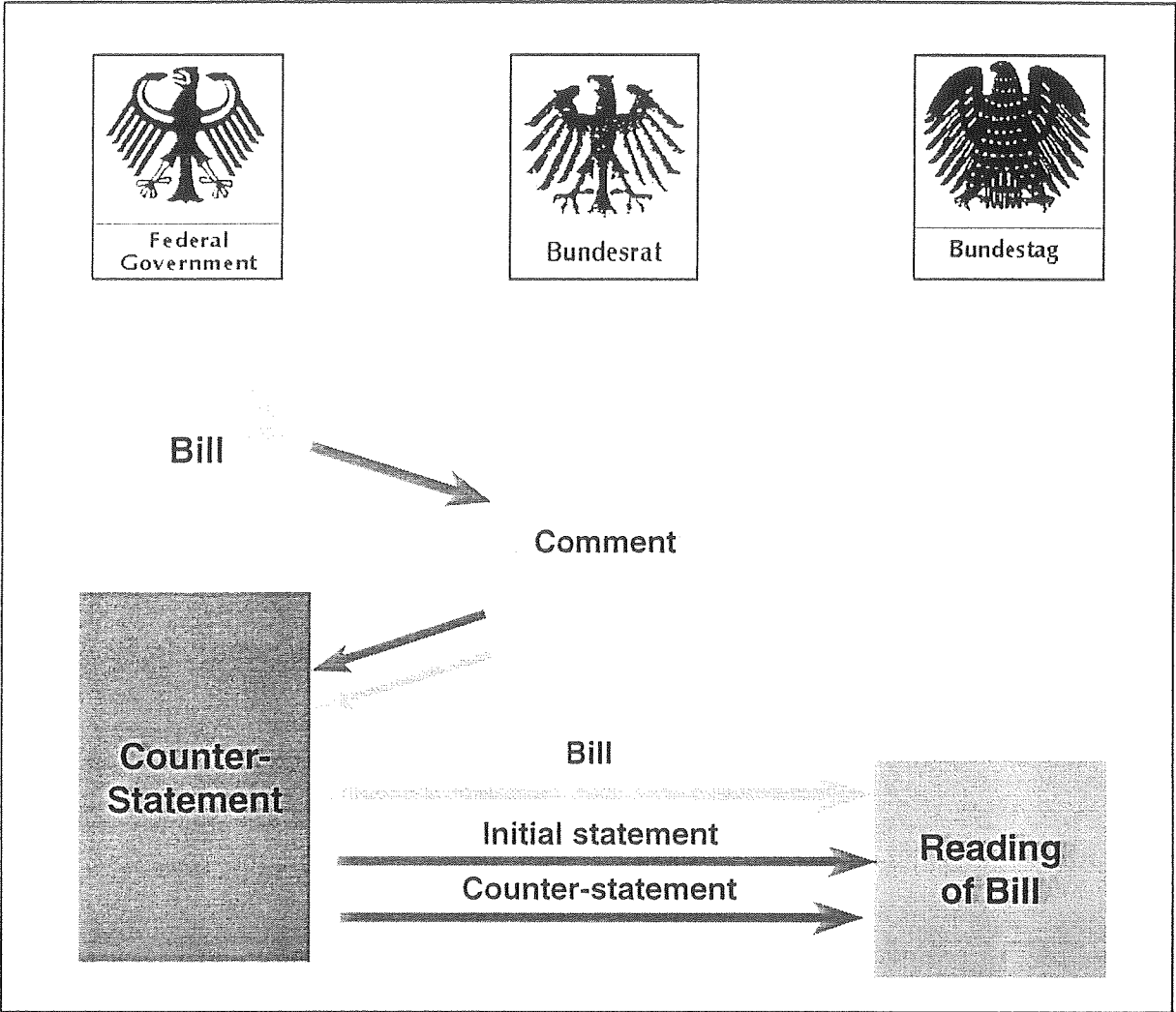
4.10 Bills initiated by the Federal Government

The great majority of Bills are introduced by the Federal Government. The Federal Government is required to submit them to the Bundesrat for comment. The review and discussion of legislative proposals submitted by the Government are two of the Bundesrat’s primary functions. The States are responsible for the implementation of almost all laws. Bundesrat committees assess Bills in terms of constitutionality, technical expertise, finances and political factors and quite often propose changes. The Federal Government can formulate its view in a “counter-statement”. The Bill, the Bundesrat’s initial statement and the government’s counter-statement are then sent to the Bundestag.

⁹¹ Bundesrat, *Op Cit*, p.10.

Chart 6 outlines the process for comment on Bills initiated by the Federal Government.

Chart 6⁹²



All Bills approved by the Bundestag must be sent to the Bundesrat. The Bundesrat Committee determines whether their first “review” has been taken into account or the Bundestag has made other changes. If the Bundesrat does not agree with the version of the Bill passed by the Bundestag, it can apply to the Mediation Committee within a period of three weeks. The Mediation Committee is comprised of 16 members of the Bundesrat and 16 representatives of the Bundestag. The Mediation Committee’s task is to find a compromise.

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Ibid. p.11.

There are two types of Bills -

1. Consent Bills⁹³

Bills which have a bearing on State interests cannot become law unless the Bundesrat gives express approval. Such Bills are classified into three groups -

- Bills that would change the Constitution require Bundesrat approval based on a two-thirds majority;
- Bills affecting State finances including Bills involving taxes, in the collection of which State or local authorities have a part;⁹⁴ and
- Bills affecting the administrative jurisdiction of the States.⁹⁵

The power to veto this kind of legislation gives the Bundesrat a great deal of influence on the legislative process. Fifty per cent of the Federal laws are so-called consent laws which are laws which require the consent of the Bundesrat to enter into force. If the Bundesrat does not give consent, these laws cannot come into force. This gives the Länder a very strong position. Apart from the consent laws which make up one half, the other half is made up of so-called objection laws.

See Chart 7 which outlines Consent Bill proceedings on page 38

2. Objection Bills

In the case of legislation not requiring the Bundesrat's approval, referred to as "objection Bills", the Bundesrat can file an objection within two weeks of the conclusion of mediation proceedings. This means that the Bundestag must subject the Bill to another reading. The Bundestag can override the objection (passed by an absolute majority in the Bundesrat) with an absolute majority. If the Bill is overridden, the Bill may be signed and promulgated despite the Bundesrat's disapproval.

See Chart 8 which outlines Objection Bill proceedings on page 39

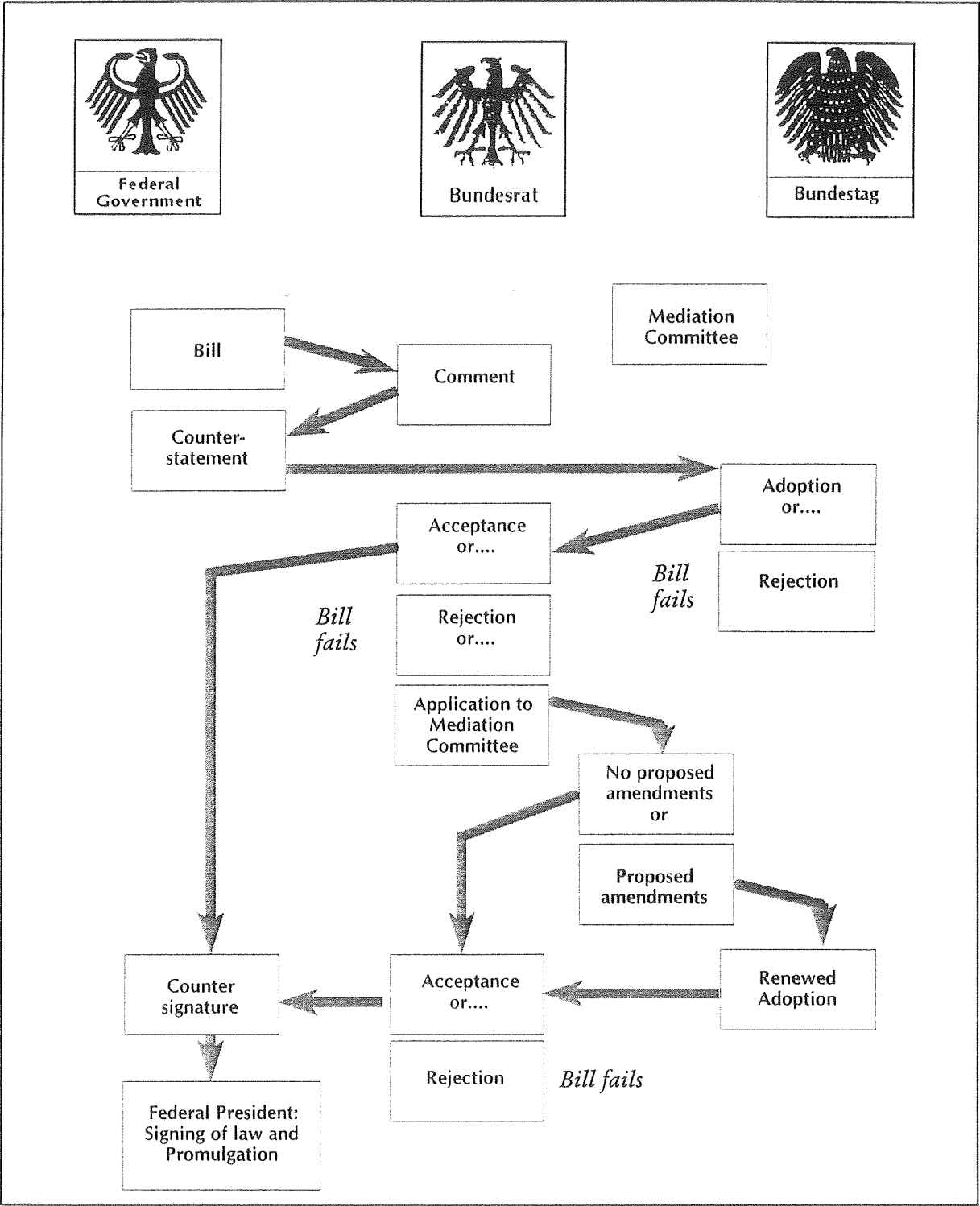
⁹³ About half of federal legislation consists of "consent Bills" requiring Bundesrat approval.

⁹⁴ For example, income tax, value-adding tax and motor vehicle tax.

⁹⁵ If a Bill contains only one provision that in any way affects States' rights, the entire Bill requires Bundesrat approval.

Chart 7 outlines Consent Bill proceedings.

Chart 7⁹⁶

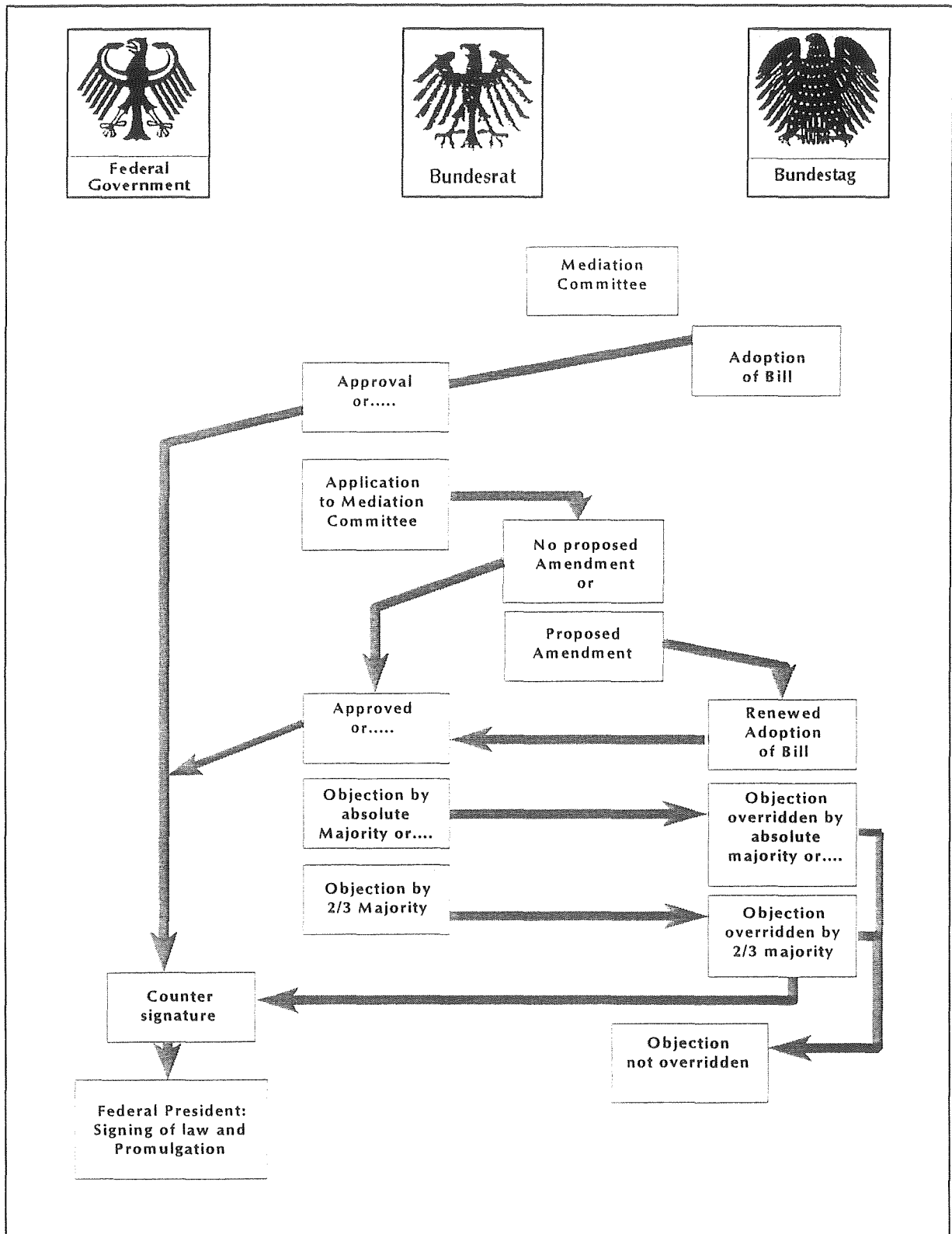


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Bundesrat, *Op Cit*, p.15.

Chart No. 8 outlines the Bundesrat and the progress of Objection Bills.

Chart 8⁹⁷



4.11 The Execution of Federal Laws and Federal Administration

The States execute federal laws as matters of their own concern in so far as the Basic Law does not otherwise determine. In doing so, they regulate the establishment of authorities and the administrative procedures, but the Federal Government exercises the supervision in order to ensure that the Länder execute federal laws in an appropriate manner.⁹⁸

Almost all legislation is federal, including the tax legislation. This does not mean that the Länder are without any say, because as soon as they are affected by certain tax legislation, they have to approve those pieces of legislation in the Bundesrat. It is the executive of the States rather than the legislature of the States which deals with these matters because the composition of the Bundesrat, its members of Länder Governments and not members of Länder Parliaments.

A principle of the Basic Law is that each level of government has to pay for its own expenditures. As the Länder have the bulk of the executive power and administer the law, they spend the money. However, to a large extent, expenditure is based not upon their own decisions but upon decisions made by federal law.

4.12 Participation in European Union Affairs

With the continued process of integration in the European Union (EU) German national legislation is increasingly influenced by regulations approved by the EU. The Bundestag and the States, through the Bundesrat participate in the affairs of the European Union.⁹⁹ The Federal Government must inform the Bundestag and the Bundesrat concerning all European Union activities. The Bundesrat comments on drafts of European Union regulations and directives submitted to it. When European legislation affects subjects that fall within the Federation's domestic jurisdiction, the Federal Government must take the Bundesrat's comments "into account" in its decision. If such legislation primarily affects State (Länder) legislative jurisdiction, then the Bundesrat has the final say in determining the German position within the Council of Ministers in the EU. In cases in which EU regulations mainly affect legislative competencies that belong exclusively to the States, then the head of the German delegation and spokesman within the Council of Ministers in the EU is a State Minister appointed by the Bundesrat.

Article 146 of the Maastricht Treaty states that in federally organised countries, on matters affecting their States, the delegation of the Member State, could be led by a representative of the State. This has enhanced the influence of the Länder.

The Federal Government is under an obligation to give the Bundestag and Bundesrat every piece of European Community legislation before the vote in the European Council is taken. In 1986 the *Single European Act*, which was the basis of the single European market, required ratification and the consent of the Bundesrat. The Bundesrat guaranteed ratification if they received all papers from the European Commission (EC). This requirement became part of the law enacting the *Single European Act*, and built up a much more elaborate system of scrutinising European legislation. This system was formalised and put on a constitutional law basis. Article 23 of the

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The foreign service, federal finance, federal railways, postal services, federal waterways and shipping are matters of direct federal administration.

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Article 23.2 of the Basic Law.

Basic Law provides that the Bundesrat can comment and in certain cases determine the position of the Federal Republic. The Länder Minister can conduct negotiations for the Federal Republic of Germany.

The Länder receive almost every paper from the EC via the relevant Federal Ministry -

The Länder shall participate through the Bundesrat in the legislative process and administration of the Federation and in matters concerning the European Union.¹⁰⁰

A new provision in the Treaty of Amsterdam 1997 aims to stress the role of the national Parliaments in the scrutinising process.

A large majority of Germans are, in favour of the European Union. Germany can be considered one of the major driving forces behind European integration. One of the most important aspects of European integration for Germany is the economic aspect. Germany is one of the world's largest exporting nations and a large part of Germany's exports go to the other countries of the EU. Europe has a common market of between 300 and 400 million people. This huge market gives European countries and Germany a very strong position in the process of globalisation.

Until about 10 years ago the regions of the various EU member countries had virtually no say about what went on in the EU, however there have been two major achievements at the European level -

- Enforcement of the principle of subsidiarity which says that the European Union is empowered to perform those tasks which cannot be performed better at national or regional level; and
- Establishment within the European Union the so-called Committee of the Regions.¹⁰¹

The Committee of the Regions has no powers of co-decision, but it has to be consulted. In matters which concern or affect the exclusive legislative competence and the interests of the Länder, the negotiations are conducted not by representatives of the Federal Government but by one of the Ministers of the States.

The Chancellor of Germany fought to increase the rights of Länder participation at the EU level. By doing that, he also improved the atmosphere and the climate for co-operation at national level in Germany between the Federation and the Länder. At the EU summit meeting in Amsterdam, two German Länder were represented at the conference and took part in the discussions.

The representatives of the Länder are absolutely convinced of the need for a European Union but a European Union which has a strong parliamentary base.

4.13 The Administration of Justice

Judicial authority is vested in independent judges, who are subject only to the law and who may not be dismissed or transferred against their will.¹⁰²

¹⁰⁰ *Ibid*, Article 50.

¹⁰¹ Germany has representatives of the Länder, the constituent States on the committee.

¹⁰² Article 97 of the Basic Law.

Justice is exercised by the Federal Constitutional Court, by the Supreme Federal Courts and by the Courts of the Länder. The Federal Constitutional Court decides on the interpretation of the Basic Law in cases of doubt, on the compatibility of Federal law or Land law with the Basic Law, and on disputes between the Federation and the Länder or between different Länder. Supreme Federal Courts are responsible for the spheres of ordinary administrative, fiscal, labour and social jurisdiction.

4.14 Federal Constitutional Court

In Australia appointments to the High Court are Cabinet appointments. In Germany judges to the Constitutional Court must be elected by both chambers of the Parliament on a rotating system; half of them by the Bundestag and the other half by the Bundesrat and in each case they must be elected on the basis of a two-thirds majority in order to build a dam against politicisation of the court.

4.15 Committees

The Bundesrat has permanent committees which make recommendations for decisions to be taken by the body as a whole. There are 16 committees and their areas of responsibility correspond to areas of ministerial jurisdiction. Every State sends one representative, not necessarily a member of the Bundesrat, to each committee.

There is not a strict link between committees and the State Parliament. The only link between the committee work and their scrutinising and State Parliament is the parliamentary responsibility of the head of the department. It is rather indirect, although in the various Länder they have agreements between the State Government and the State Parliament that the State Parliament has to be informed as soon as there is a scrutinising process taking place in the Bundesrat which is of particular interest to the Länder. Informing the State Parliament is not based on the Constitution but it is based on an individual negotiated agreement between the State Parliament and the State Government.

All the State Parliaments have a committee on Federal and European Affairs and they try to keep track of what is happening in the Bundesrat, as far as European scrutinising is concerned.

Chart 9 - sets out the 16 Bundesrat Committees

Chart 9¹⁰³

| | | | | |
|------------------------------|---|---|--|---|
| Committee on Foreign Affairs | Committee on Defence | | | |
| Agriculture Committee | Committee on Labour and Social Policy | Committee on European Union Affairs | Committee on Family and Senior Citizen Affairs | Finance Committee |
| Committee on Women and Youth | Committee on Health | Committee on Interior Affairs | Committee on Cultural Affairs | Committee on Urban Development, Housing and Regional Planning |
| Committee on Legal Affairs | Committee on Environmental Nature Protection and Reactor Safety | Committee on Transport and Postal Affairs | Committee on Economic Affairs | |

4.16 The Mediation Committee

If the Bundesrat and the Bundestag are unable to reach an agreement, they refer the Bill in question to the Mediation Committee. The function of the Mediation Committee is to submit compromise proposals whenever there are differences of opinion between the Bundestag and the Bundesrat on the content of Bills. It is a permanent joint committee on which both the Bundestag and Bundesrat are equally represented. The Bundesrat has 16 representatives - one from each State - and the Bundestag has an equal number of representatives, bringing the total number to 32. The Mediation Committee can only make proposals. It has no decision-making powers as regards the contents of a Bill.

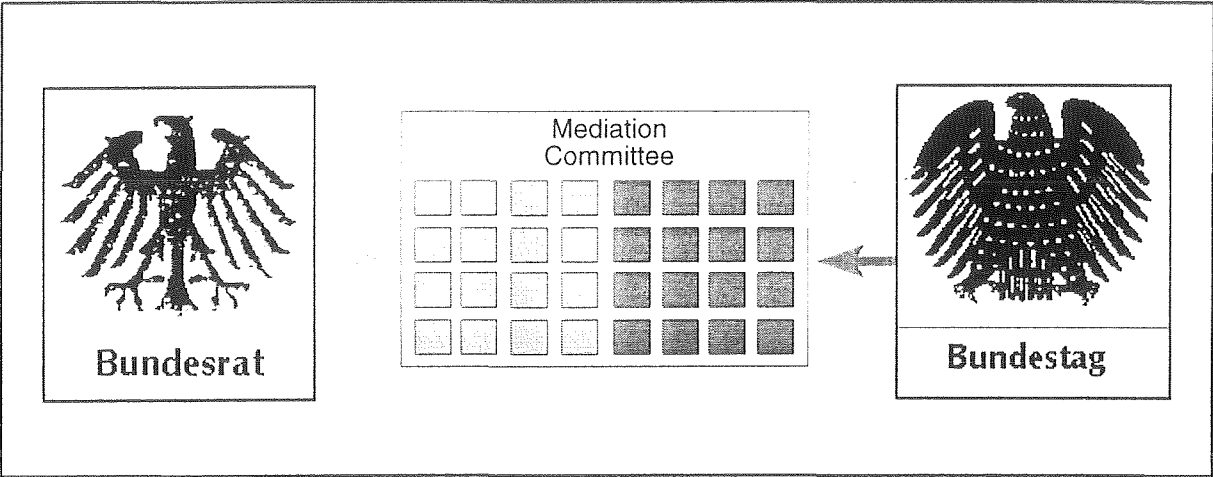
The task of the Mediation Committee is to mediate, to find a compromise and if a solution is too difficult to find, then it requires the approval of both Houses of Parliament.

¹⁰³

Bundesrat, *Op Cit*, p.27.

Chart 10 outlines the Mediation Committee.

Chart 10¹⁰⁴



4.17 Finance

The Federation has the exclusive power to legislate only on customs and fiscal monopolies. On most other taxes, especially on income, property and inheritance, it has concurrent power to legislate with the Länder.

Customs, fiscal monopolies, excise taxes (with exception of beer tax) and levies within the framework of the European Union are administered by federal finance authorities, and the revenues accrue to the Federation. The remaining taxes are administered, as a rule, by the Länder and the Gemeinden (communes) to which they accrue. Income tax, corporation tax and value-added tax are shared taxes, accruing jointly to the Federation and the Länder (after deduction of a proportion of income tax for the municipalities).¹⁰⁵ The Federation and the Länder are to be self-supporting and independent of each other in their fiscal administration.¹⁰⁶ In order to ensure the working efficiency of the Länder with low revenues and to equalise their differing burdens of expenditure, there exists a system of revenue sharing among the Länder. In addition, the Federation may make grants, out of its own funds, to the financially disadvantaged Länder.

The Federation can pay grants to the Länder in fields which are constitutionally fields of Länder functions. These specified areas that require co-financing of the Federation are administered under a system of a joint planning commission.

Horizontal equalisation is a fiscal equalisation system by which the richer States contribute to the maintenance of the poorer States. There is also a system of vertical grants from the Federation to the poorer States.

¹⁰⁴ *Ibid*, p.29.

¹⁰⁵ Article 106 of the Basic Law.

¹⁰⁶ *Ibid*, Article 109.

Almost all federal tax law needs the consent of the Bundesrat. But that does not mean that the Bundesrat has the power alone to change these laws because the consent of the Bundestag is required. The Bundestag on its own could not lower a tax, which is also part of the State income, without the consent of the Bundesrat.

4.18 The State (Land) Governments

The 16 States of Germany are autonomous but not sovereign States, enjoying a high degree of self-government and extensive legislative powers.¹⁰⁷

Gustav Wabro stated -

The Länder were established before the Federal Republic itself. The individual constituent States have a Parliament, a Government, legislative jurisdiction, and powers and are also responsible for administration in their territory. The jurisdiction between the Federal Government and the State Governments is defined very clearly in the Basic Law in every particular field. As far as legislation is concerned, it states in the Basic Law that the constituent States, (the Länder), have the power to legislate unless by law the Federation is authorised to legislate. So in every area where the Federation is not specifically given the power to legislate, the Länder can legislate. The Basic Law, defines a number of different kinds of legislative jurisdiction. Exclusive federal legislative jurisdiction; for example, is foreign relations. There are also several areas of concurrent legislative jurisdiction. Areas covered by so-called concurrent legislative jurisdiction are, for instance, civil law and criminal law and if the Länder do not make use of their legislative powers in these fields, then the Federation may do so.¹⁰⁸

In the last few decades, there has been a transfer of powers from the constituent States, to the central government, with the aim of creating equal living conditions in Germany as a whole. The individual Member States of the European Union are also transferring powers and sovereignty to the European Union. In Germany too, not only have the powers of the Federation been transferred to EU, but also the powers of the States.

For the German States, there are three main areas of legislation still in force -

- educational law, cultural affairs;¹⁰⁹
- police law, and
- organisation of municipal communities at the community level.

In the first area, there is very close co-operation of the States among each other as they are under pressure to make sure that pupils all over the country can make use of their high school diplomas in other parts of the country. Although, in theory, it would be possible to have very individual solutions on the question of how to organise school education, in practice, there is a very strong move to have a uniform situation. There is a permanent conference of Ministers of Culture of the 16 Länder.

¹⁰⁷ Thirteen of the Länder have a Landesregierung (Government) and a Landtag (Assembly). The equivalent of the Landesregierung in Berlin, Bremen and Hamburg is the Senate. The equivalent of the Landtag is the House of Representatives in Berlin and the City Council in Bremen and Hamburg.

¹⁰⁸ Gustav Wabro, State Secretary from the State of Baden-Württemberg, Bundesrat, Bonn, meeting, 10 July 1997.

¹⁰⁹ This is certainly a most important area.

In the second area, there is quite a bit of State legislation. There is also a conference of Ministers of the Interior who are all responsible for the Police Forces in all the 16 States. The States, together with the Federal level were involved in drafting uniform police legislation. A Bill, which was to a large extent uniform resulted. The harmonisation process took a couple of years and involved very difficult negotiations. The result was uniform laws in the States although there are certain differences.

The third area, is municipal law. There has been little harmonisation in this area. There are three or four different models of municipal organisations throughout the Federal Republic.

In Germany, generally speaking, uniform legislation is stressing and strengthening the role of the State Executive. Dr Risse states -

In the German population you will always find a vast majority of people who say, "We are in favour of federalism" but as soon as you ask them if they will accept different standards for their school education, which might present them with certain problems if they move from Berlin to Bonn or vice versa, they would say, "No; we want to have it uniform." Having uniform living conditions is a political goal which is accepted by a vast majority of the people, notwithstanding the fact that they all say federalism is a nice thing, but as soon as federalism creates differences, they don't like it anymore.¹¹⁰

4.19 Treaties

In matters relating to treaties, Germany has dealt with the issue in a very pragmatic way. Both the Federation and the Länder established a procedure by which the Länder communicates with the Federation in the process of negotiating with foreign powers over agreements or treaties. It has set up the Permanent Treaty Commission. The Commission must be informed of any negotiations with any foreign power. The Länder can convey any concerns via the Commission. Ratification can only take place after the Commission makes a recommendation to the Länder Cabinets and the Länder give their consent to the treaty.

¹¹⁰

Dr Horst Risse, Head of the Speaker's Office, Bonn, meeting, 10 July 1997.

Chapter 5: Canada

5.1 Introduction

Canada is an independent sovereign democracy and also a Federal Parliamentary State, with 10 Provinces and two Territories. It is a constitutional monarchy, and the Head of State is the British Monarch represented by the Governor General, who is appointed on advice of the Canadian Prime Minister and is now always a Canadian.

The Federal Parliament comprises the Head of State, an appointed upper House, (the Senate) and an elected lower House, (the House of Commons). A Parliament may last no longer than five years. The Governor General appoints ministers to form the Cabinet on the recommendation of the Prime Minister. The Prime Minister should have the confidence of the House of Commons to which the Cabinet is responsible.

The Cabinet is responsible for most legislation. It has the sole power to prepare and introduce Bills providing for the expenditure of public money or imposing taxes. These Bills must be introduced first in the House of Commons.

The *British North America Act 1867* brought the Canadian Federation into existence. It was an Act of the British Parliament. This Act, renamed the *Constitution Act 1867* contained no provisions for its own amendment, except a limited power for the Provinces to amend their own Constitutions. All other amendments had to be made by an Act of the British Parliament. The Canadian Constitution was “patriated” in 1981 after more than half a century of Federal Provincial conferences and negotiations. This was finally achieved with the agreement of the Senate and the Houses of Common and the nine Provincial Governments. The *Constitution Act 1982* with the other Acts that make up the Constitution of Canada established processes for amending the Constitution and set out a Charter of Rights and Freedoms that neither Parliament nor any Provincial Legislature acting alone can change. The Charter widens the jurisdiction of courts and puts some limits on the sovereignty of the Parliament and Provincial legislatures. The *Constitution Act 1982* also contains a section on equalization of regional disparities and provides guarantees for the English and French languages and enhances the multicultural heritage of Canada.

5.2 The Senate

The Senate usually comprises 112 members appointed on a regional basis. The Senators are appointed by the Governor General on the recommendation of the Prime Minister. They hold office until age 75 unless they miss two consecutive sessions of Parliament. The Senate can initiate any Bills except Bills providing for the expenditure of public money or imposing taxes. No Bill can become law unless it has been passed by the Senate.

Most of the amendments the Senate makes to Bills passed by the Commons are clarifying or simplifying amendments. The Senate’s main work is done in its committees.

5.3 The House of Commons

The House of Commons is the major law-making body. It has 295 members, one from each of 295 constituencies. In each constituency, the candidate who gets the largest number of votes is elected, even if his or her vote is less than half the total. In addition to legislative committees, whose sole function is to examine Bills referred to them after second reading, the House of Commons also maintains a system of standing committees.

5.4 Provinces and Municipalities

Every Canadian Province has a Legislative Assembly (there are no upper houses). Members are normally elected for not more than five years, from which a Premier is chosen, with a Lieutenant-Governor and two Territories constituted by Act of Parliament. All Bills must go through readings, and receive Royal Assent by the Lieutenant Governor.

Municipal governments - cities, towns, villages, counties, districts, metropolitan regions - are set up by the Provincial legislatures, and have such powers as the legislatures give them.

5.5 Judicial System

Under the Canadian Constitution almost all courts are Provincial, that is, created by the Provincial legislatures and judges of all the courts from county courts up are appointed by the Federal Government. Judges of Provincial superior courts, are removable only on address to the Governor General by both Houses of Parliament. The Acts setting up the Supreme Court of Canada and the Federal Court have a similar provision.

The Supreme Court interprets the written Constitution, and so defines the limits of federal and provincial powers. The Supreme Court of Canada which was established by an Act of the National Parliament in 1875, consists of nine judges, three of who must come from Quebec. The judges are appointed by the Governor General on advice of the national cabinet, and hold office until they reach the age 75 years. The Supreme Court has the final decision not only on constitutional questions but also on defined classes of important cases of civil and criminal law.

5.6 Powers of the National and Provincial Governments

The Canadian National Parliament has power -

... to make laws for the peace, order and good government of Canada, [except for] subjects assigned exclusively to the legislatures of the Provinces.

The Canadian Constitution is the opposite of the Australian Constitution in this respect -

- In Australia, the powers of the central government are strictly defined, the residue of power is retained by the States; and
- In Canada, the powers of the Provincial Governments are strictly defined, and the residue of power is conferred on the central government.

Provincial legislatures are limited to the powers explicitly given to them by the written Constitution. These powers include, power over direct taxation for Provincial purposes, natural resources, prisons, hospitals, municipal institutions, the creation of courts and the administration of justice, and education (subject to certain rights of the Protestant and Roman Catholic minorities).

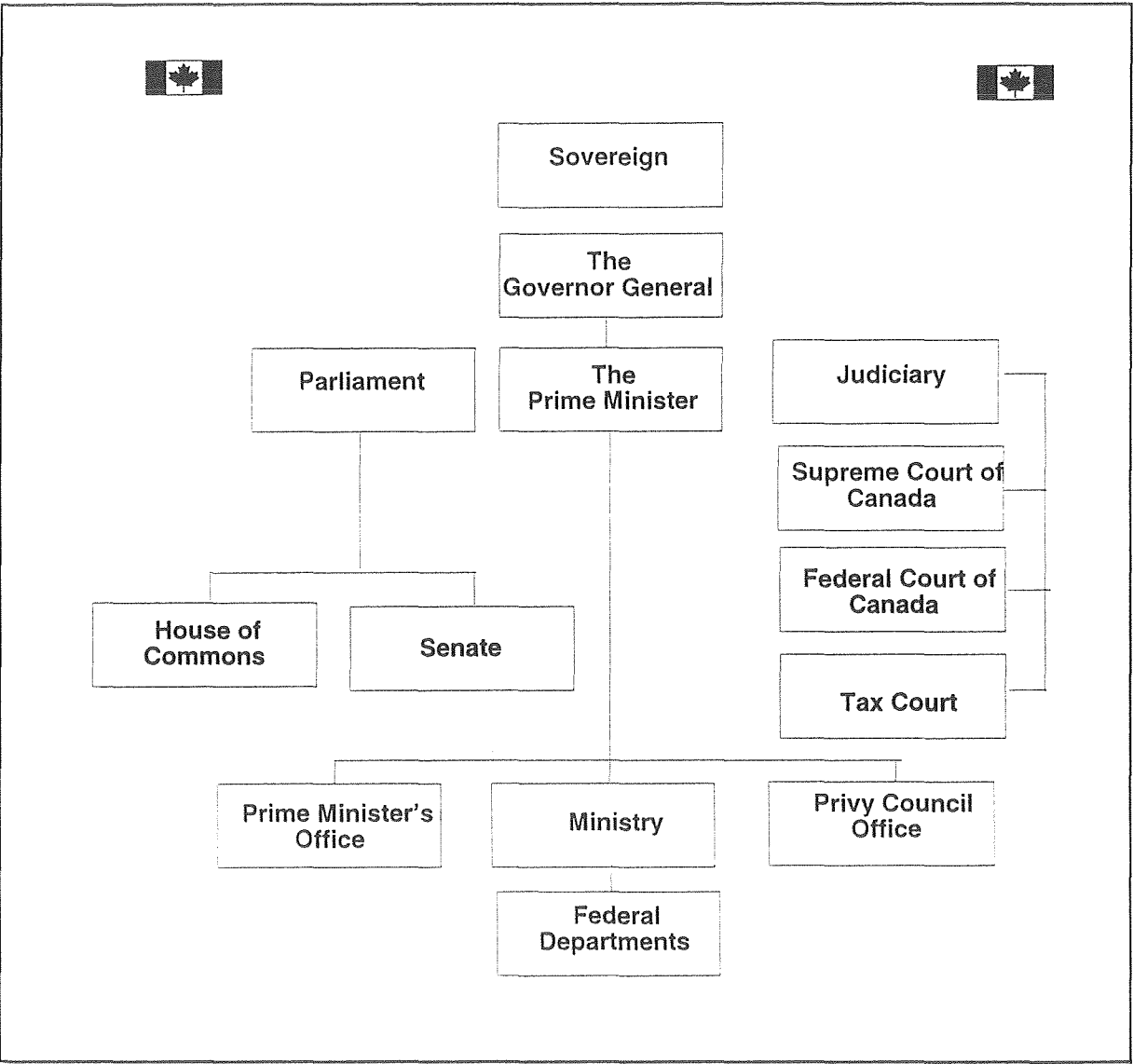
The National Parliament and the Provincial legislatures both have power over agriculture and immigration, and over certain aspects of natural resources, but if their laws conflict, the national law prevails. However, the National Parliament and the Provincial legislatures also have power over old age, disability and survivors' pensions, but if their laws conflict, the Provincial power prevails.

Until 1949 the British Privy Council was the final court of appeal in Canada and its interpretation of the Canadian Constitution extended the powers of the Provinces beyond that originally intended by the framers of the Constitution.

There is a long list of exclusive national powers, these include, taxation, direct and indirect, regulation of trade and commerce,¹¹¹ “the public debt and property” (this enables Parliament to make grants to individuals - such as family allowances - or to Provinces: hospital insurance and medical; higher education; public assistance to the needy; and equalization grants to bring the standards of health, education and general welfare in the poorer Provinces up to an average national standard); the post office; the census and statistics; defence; navigation and shipping; fisheries; railways; telegraphs; and other such international or inter Provincial “works and undertakings”; money and banking; indigenous people and their lands; the criminal law and local works declared by Parliament to be “for the general advantage of Canada or of two or more of the Provinces”.

Chart 11 set out below is the Canadian Organizational Chart.

Chart 11



¹¹¹ The courts have interpreted this to mean inter provincial and international trade and commerce.

5.7 Canadian Federation

Like Australia, Canada is a federation. However, there are significant differences between Australia and Canada, mainly flowing from interpretation of the Canadian Constitution.

Canadian society is increasingly bilingual and multicultural. In Canada, French-speakers are the most important minority group. French-speaking Quebecers have a special relationship with their Provincial Government, since it is the sole government where the majority of elected representatives are French-speaking.

The Federal Parliament passed a resolution in December 1995 recognizing “that Quebec is a distinct society within Canada” by virtue of “its French-speaking majority, unique culture and civil law tradition”.

Generally Canadian federalism is in favour of moving towards more differentiation, this is to some degree driven by the Quebec issue. Canadian federalism has accommodated Quebec’s difference. Quebec has often opted out of broad intergovernmental agreements. In many areas, Quebec has special arrangements while there is broad uniformity with the rest of the country. There is specific constitutional recognition of the Quebec difference.

The Standing Committee had discussions with Bill Forward, Assistant Deputy Minister at the Office of Constitutional Affairs and Federal-Provincial Relations, Ontario, who stated -

Personal income tax is another area where Quebec has a special agreement, it basically runs its own personal income tax system. All the other Provinces piggy-back on the Federal Government personal income tax system and there is the so-called tax collection agreements.¹¹²

The key issues in Canadian federalism today is trying to work out more uniform approaches in the name of efficiency and reducing overlap and duplication. One area is the development of a National Securities Commission. Currently the Provinces have constitutional authority to regulate securities.

Professor Fred Lazar stated -

...Each Province has its own securities laws and various stock exchanges are regulated by the respective Provinces.¹¹³ there is no national securities law and national exchange such as the New York Stock Exchange.

There have been concerns about the economic costs of regulatory differences. Bill Forward also stated -

... the Province of Ontario has listened to the securities industry, who believe that having one securities regulator made more sense than having ten across the country because of globalisation of markets.¹¹⁴

¹¹² Bill Forward, Assistant Deputy Minister at the Office of Constitutional Affairs and Federal Provincial Relations, Toronto, meeting, 15 July 1997.

¹¹³ Professor Fred Lazar, Professor of Economics, Faculty of Arts, York University, School of Business, Toronto, meeting, 14 July 1997.

¹¹⁴ Bill Forward, Assistant Deputy Minister at the Office of Constitutional Affairs and Federal Provincial Relations, Toronto, meeting, 15 July 1997.

The Provinces and the Federal Government are under pressure to try and deal with unproductive differences in internal trade. Negotiations in the 1990's have resulted in the Internal Trade Agreement. It was signed in July 1994 and came into effect in July 1995. It deals with procurement and labour mobility, professional qualifications and trade qualification. There has been pressure from the business community in Canada and other experts who believe in a more integrated internal market. The Agreement requires that the Provinces try and harmonise as much as possible and mutually recognize standards and regulations in other jurisdictions. The Agreement on Internal Trade is a purely political document, the Provincial Governments have not adopted implementing legislation.

Professor Fred Lazar stated -

... in some areas Provincial legislation has created inter-provincial barriers, for example, labour legislation, preferential government procurement. ... The Federal Government has tried to eliminate these trade barriers and encouraged some harmonisation. Trade barriers have prevented individuals from moving between Provinces to offer services. For example, beer companies must have a brewery in each Province in order to sell in that Province, this restriction has prevented breweries from consolidating their operations and taking advantage of economies of scale. The Free Trade Agreements have removed trade barriers between countries in North America but trade barriers between Provinces still exist.¹¹⁵

Canada not only has two languages, it also has two legal systems. A common law system for most of Canada and a civil law system in Quebec. A different law degree is required to practice law in Quebec.

David Cameron stated -

There have been six devices that have been used in Canada to develop national policy, common standards and uniform approaches.

1. Constitutional amendment - In 1982 the Constitution was brought back from Great Britain and included the capacity and formula for Canada to amend its own Constitution. A Charter of Rights and Freedoms was included in the Constitution which includes language rights as well as democratic, legal rights and recognition of aboriginal historical claims and entitlements.
2. Federal spending power - The Federal Government can use its capacity to spend money indirectly to achieve certain goals.
3. Intergovernmental Agreements - The Federal Government and the Provinces can enter into intergovernmental agreements on specific areas for a specific period of time.
4. Multi-lateral treaties - Like the Agreement on Internal Trade (AIT) which set up principles to deal with problems of restrictions on internal trade within Canada.
5. The *Law of the Lion* - An example of this is where one of the "actors" is so big that the others feel obliged to follow suit - For example, in the regulation of securities, which is a Provincial domain, the lion, the biggest stock exchange sets the rules and other jurisdictions harmonise to those rules.
6. *Laissez faire* or political culture - There are uniform policies or common practices where there has been no regulation or agreement in any formalised sense but practices are common. For example, a student can move from one university to another across the country without being charged an out of Province fee.

¹¹⁵

Professor Fred Lazar, Professor of Economics, Faculty of Arts, York University, School of Business, Toronto, meeting, 14 July 1997.

These devices are used to try and achieve some degree of standardisation in areas of Provincial jurisdiction.¹¹⁶

5.8 Uniform Law Conference of Canada

The harmonisation principle has been institutionalised in the Uniform Law Conference of Canada -

In the second decade of this century, the Canadian Bar Association recommended that each Provincial Government provide for the appointment of Commissioners to attend conferences organized for the purpose of promoting uniformity of legislation among the Provinces.¹¹⁷

The primary objective of the Uniform Law Conference of Canada is to promote uniformity of legislation throughout Canada or the Provinces and Territories. It prepares uniform statutes that it recommends for enactment by the Provinces, Territories and the Federal Government. On occasion it promotes particular provisions for statutes or publishes guides to uniform legal procedure. In criminal matters it usually adopts proposals for changes or additions to the Criminal Code and other Federal legislation.

The Uniform Law Conference is a creation of the Justice Ministries. It is the only body who is charged with the harmonisation of laws.

While the chief work of the Conference has been to try and achieve uniformity in subjects covered by existing legislation, the Conference has prepared uniform laws on subjects not yet covered by legislation in Canada.¹¹⁸ The Conference has recommended a uniform statute before any legislature had dealt with the subject.¹¹⁹ It has recently completed a uniform mental health statute, for example. Another project on uniform laws has been on consumer credit. There is no equivalent to the Uniform Law Conference of Canada in Australia.

In most Provinces grants are provided towards the general expenses of the Conferences and the delegates. Generally appointees to the Conference come from the bench, government law departments, faculties of law, the practising profession, and, in recent years, Law Reform Commissions and similar bodies.

The Uniform Law Conference plays a role as well as an advisory group on private international law which is made up of a committee including representatives of the Federal Minister for Justice and Provincial and Territory representatives.

The Uniform Law Conference can only make recommendations. Some proposals may receive a level of visibility if particular Ministers are interested in the proposal and it is considered at a Federal/Provincial Ministers' meeting. The proposal may sometimes go to a committee who may hold hearings, hear witnesses, debate it and propose amendments to it. However, there may be more uniformity in practice than there is in theory. For example, federal jurisdiction in the area

¹¹⁶ Professor David Cameron, Department of Political Science at the University of Toronto, meeting 15 July 1997.

¹¹⁷ Uniform Law Conference of Canada Proceedings of the Seventy-sixth Annual Meeting, Charlottetown, Prince Edward Island, August 1994, p. 22.

¹¹⁸ Examples are the *Uniform Survivorship Act*, section 39 of the *Uniform Evidence Act* dealing with photographic records, the *Uniform Regulations Act*, the *Uniform Frustrated Contracts Act*, the *Uniform Proceedings Against the Crown Act*, the *Uniform International Commercial Arbitration Act* and the *Uniform Human Tissue Donation Act*.

¹¹⁹ Uniform Law Conference of Canada, Proceedings of the Seventy-eighth Annual Meeting, Ottawa, Ontario, August 1996.

of banking and in the area of criminal law provides uniformity. The mere fact that there has been little legislative activity in certain areas means that old British Acts from the late nineteenth and early twentieth century were copied and are still in force in Canadian Provinces. For example, the English *Sale of Goods Act 1893*.

5.9 Intergovernmental Relations

There is a strong agenda in Canada in intergovernmental relations. This move is directed at the roles of Federal and Provincial Government responsibilities and how to make them more efficient, effective and accountable and reduce overlap, duplication and increase intergovernmental co-operation. There is of course the Quebec dimension. Quebec has traditionally favoured decentralisation of the federation - more powers for the Government of Quebec.

Intergovernmental agreements are negotiated as are multilateral agreements between the Provinces and the Federal Government as well as bilateral agreements between a Province and the Federal Government.

Unlike Australia which tends to have more formal Ministerial Council meetings Canada has a much more informal system. Ministers of most portfolios do meet from time to time but not regularly.

John Gregory, the General Counsel the Cabinet Office, Ontario stated -

The criminal law in Canada is the Criminal Code which is federal law. Canada has a complicated system in the area of law enforcement. Three Provinces have provincial police forces.¹²⁰ Most other Provinces have provincial police that are essentially the Royal Canadian Mounted Police (RCMP) under contract with the Federal Government. There are also a number of municipalities that rely on the RCMP for policing and a number of municipal forces. Although policing is a provincial responsibility the RCMP does most of the policing for the Provinces under contract.¹²¹

John Gregory, General Counsel of the Cabinet Office stated -

In the last fifty years Canada has done two things in the commercial law area. One is consumer protection. Provinces copied the *Consumer Protection Act* of Ontario. Efforts were made in the early 1970s among the ministries responsible to harmonize the law. There was an *ad hoc* agreement which produced a good deal of commonality in consumer protection laws but not uniformity. This meant if you were carrying on business across the country you would have to fill in 10 or 12 sets of forms. In personal property security, again, Ontario took the lead however, there is still no personal property security legislation in every province. ... So there is a conference of personal property security administrators to talk about harmonizing the practice, but it is *ad hoc*.¹²²

5.10 Treaties

The issue of international treaties and trade treaties have been of particular significance in Canada because of the Free Trade Agreement with the United States negotiated in 1987 and implemented in 1989 and also the expansion of that agreement to Mexico, the North American Free Trade Agreement (NAFTA). These agreements have raised new issues in international

¹²⁰ Ontario, Quebec and Newfoundland have provincial police forces.

¹²¹ John D Gregory, General Counsel, Cabinet Office, Ontario, Canada, meeting, 15 July 1997.

¹²² *Ibid.*

trade. They have involved the Federal Government negotiating in areas of exclusive provincial jurisdiction. As a result the relationship of the Federal Government and its responsibility for negotiation of international trade treaties and provincial powers has been an important issue in Canadian federalism.

The NAFTA Agreements have affected areas of provincial powers, so two side agreements affecting labour and the environment were signed by Mexico, the US Federal Government and the Canadian Federal Government. Labour is almost exclusively an area of provincial jurisdiction¹²³ and the environment which is largely an area of provincial jurisdiction. Those side agreements do not come into force in Canada until the majority of Provinces agree to be bound.

The Federal Government may sign agreements in areas of provincial jurisdiction. However, they may not be implemented. So even though Provinces cannot be bound by international trade agreements in an area of exclusive provincial jurisdiction, the Federal Government is vulnerable for retaliation by the trade partner if those agreements are not honoured.

¹²³

Except for Federal civil servants and the army.

Chapter 6: The United States of America

6.1 Introduction

The United States of America is a Federal Republic. The 50 constituent States have their own executive, legislature and judiciary, and are in theory sovereign, although in practice, their degree of autonomy is increasingly circumscribed.

The United States (US) Constitution provides the basic framework of the federal system. The Federal Government and the Governments of the States exist side by side. The American system of federalism involves the sharing of governing powers between the National Government and the fifty State Governments.

Provisions of the US Constitution empower the National Government, giving it legal authority to govern as well as limiting the National Government's powers.

Ultimate judicial power is vested in the Supreme Court, which has the power to disallow legislation and to overturn executive actions which it deems unconstitutional.

6.2 The Executive

The United States has a Presidential system, with much of the Executive directly elected by the people. So, the Executive is not responsible to the people via the Parliament. The President has the responsibility of the Federal Government. The President is head of the Executive and is elected for a four-year term by a college of representatives elected directly from each State. The President appoints the other members of the Executive, subject to the consent of the Senate.

6.3 The Legislative Branch (Congress)

The United States Constitution created a strong Federal Government based on the concept of "separation of powers".

The Legislative Branch was created by the following language -

All legislative powers being granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.¹²⁴

The chief function of Congress is the making of laws. The Senate has the function of advising and consenting to treaties and to certain nominations by the President.

The Congress is the seat of legislative power and consists of the Senate and the House of Representatives. The number of representatives of each State in Congress is determined by the size of the State's population. Both the Senate and the House of Representatives have equal legislative functions and powers, except that only the House of Representatives may initiate revenue Bills.

¹²⁴

Article I, Section 1 of the US Constitution.

6.4 The Senate

The Senate is composed of 100 members, two from each State, irrespective of population or area, elected by the people in conformity with the provisions of the 17th Amendment to the Constitution. The term of office is six years and one-third of the total membership of the Senate is elected every second year. If a Senator dies or resigns during the term, the Governor of the State must call a special election unless the State legislature has authorised the Governor to appoint a successor until the next election, at which time a successor is elected for the balance of the term.

Two Senators are chosen by direct election in each State, to serve a six-year term, and one-third of the membership is renewable every two years. Representatives are elected by direct and universal suffrage for a two-year term.

In the Senate, a Senator usually introduces a Bill or resolution by presenting it to one of the Clerks at the Presiding Officer's desk, without commenting on it from the floor of the Senate. However, a Senator may use a more formal procedure by rising and introducing the Bill or resolution from the floor. A Senator usually makes a statement about the measure when introducing it on the floor. The Bill is then referred to the appropriate committee.

6.5 The House of Representatives

The House of Representatives is composed of 435 members elected every two years from among the 50 States, apportioned to their total population. If a Representative dies or resigns during the term, the Governor of the State must call a special election for the choosing of a successor to serve for the unexpired portion of the term.

Any Member of the House of Representatives may introduce a Bill by placing it in the "hopper" provided for the purpose at the side of the Clerk's desk in the House Chamber. Permission is not required to introduce the measure. The name of the sponsor is endorsed on the Bill. In the House of Representatives it is no longer custom to read Bills at the time of introduction. The Bill is assigned its legislative number by the Clerk and referred to the appropriate committees by the Speaker.

6.6 Division of Powers

The major feature of the distribution of powers in the United States is the arrangement whereby the Constitution lists subject matters under Federal Government authority - most of which are concurrent and some of which are made exclusive by prohibiting the States from acting on them legislatively and the remainder, or residual matters are left to the constituent units of the federation. The United States Constitution, provides a list of 18 powers and a residual power. Most of these specified powers are (some allowing for concurrent exercise of these powers) and include the enumeration of some matters on which State legislation is expressly prohibited (i.e. making them exclusive federal powers).

The powers granted to the National Government include national defence, foreign affairs, posts, coinage, and regulating foreign and interstate commerce.¹²⁵ The supremacy clause provides that

¹²⁵

Article I, Section 8 of the US Constitution.

when the Constitution, laws, and treaties of the National Government conflict with those of the States in areas where the National Government is empowered, the national laws shall be the “supreme law of the land”.¹²⁶

The Constitution prohibits the States from taking certain actions. Some prohibitions enhance National Government powers, while others limit the powers of the States in their relations with other States. For example, the Constitution prohibits State Governments from entering into formal treaties with foreign nations, coining money, or granting titles of nobility.

All powers not give to the National Government are retained by the States. The *Tenth Amendment* to the Constitution expressly provides that -

the powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people.

Recent Supreme Court decisions have endorsed Constitutional limits on Congress’ power. In *New York v United States* decision in 1992 the Court stated -

State governments are neither regional offices nor administrative agencies of the United States; ... Congress may not simply “commandeer” the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.¹²⁷

6.7 Sources of Legislation

Proposed draft Bills may originate in many diverse quarters. Either conceived by a member, the member’s constituents, either as individuals or a group or groups who may avail themselves of the right to petition and transmit their proposals to a member. Similarly, State legislatures may “memorialize” Congress to enact specified federal laws by passing resolutions to be transmitted to the House and the Senate as memorials. If accepted a member may introduce the proposal. “Executive communication” is the most prolific source of legislative proposals. This is usually in the form of a letter from a member of the President’s Cabinet or the head of an independent agency or even from the President transmitting a draft of a proposed Bill to the Speaker of the House of Representatives and the President of the Senate. Many of the “executive communications” follow the President’s message to Congress on the “state of Union”. The communication is referred to the standing committee or committees having jurisdiction of the subject matter of the proposed Bill, because the Bill may only be introduced by a Member of Congress. The Chairman of that committee usually introduces the Bill either in the form in which it is received or with changes the Chairman considers necessary or desirable.

Bills may originate in either the House of Representatives or the Senate, with one notable exception, that is, Bills providing for the raising of revenue must originate in the House of Representatives but the Senate may propose or concur with amendments, as on other Bills.¹²⁸

A Bill that has been agreed to by both Houses becomes law only after -

- Presidential approval; or
- failure by the President to return it with objections within 10 days; or
- the overriding of a Presidential veto by a two-thirds vote of each House.

¹²⁶ Article VI of the US Constitution.

¹²⁷ [Http://www.csg/whatsnew/supcourt.htm](http://www.csg/whatsnew/supcourt.htm).

¹²⁸ Article I, Section 7 of the US Constitution.

6.8 Committees

The most important phase of the Congressional process is the action by committees. There are 19 Standing Committees in the House and 16 in the Senate, as well as several Select Committees. In addition, there are several Standing Joint Committees. The House may also create Select Committees or task forces to study specific issues and report to the House.

Each committee has jurisdiction over certain subject matters of legislation and all measures affecting a particular area of the law are referred to that committee. The Speaker may refer an introduced Bill to multiple committees for consideration but must designate a primary committee with jurisdiction.

Membership on the committees is divided between the two major political parties. Members of the House may serve only on two committees and four sub-committees. A member usually seeks election to the committee that has jurisdiction over a field in which the member is most qualified and interested. Each committee is provided with professional staff to assist it in considering Bills and conduct oversight.

If a Bill is of sufficient importance, and controversial, the committee will usually have public hearings. Each hearing by a committee and sub-committee is required to be open to the public except when the committee by majority determines that part of the hearing will be closed because public disclosure would endanger national security or compromise sensitive information or violate a law or a rule of the House.

After hearings are completed the Bill is considered. Reports on the Bill are made including proposed changes to the Bill. The Committee Report must be filed with the House. The Committee's Reports are a valuable element of the legislative history of the law. They are used by courts, executive departments and agencies, and the public generally, as a source of information regarding the purpose and meaning of the law.

Each Standing Committee is required to review and study on a continuing basis, the application, administration, execution, and effectiveness of the laws dealing with the subject matter over which the committee has jurisdiction and the organisation and operation of federal agencies and entities having responsibility for the administration and evaluation of those laws.

6.9 The States

According to the *Tenth Amendment* the reserved powers are all State powers except those specifically delegated to the National Government or prohibited to the State Government. The *Tenth Amendment* does not grant powers to the States, it simply affirms that the National Government will not interfere with them. There is no list of reserved powers. The Supreme Court over the years has acknowledged that State power exists in a number of areas, including, public health, public safety, public welfare and public education. The Constitution does not list concurrent powers which are powers held by both the National and State governments. However, the States may not pass laws that conflict with national law.¹²⁹

The States may form a coalition against a piece of federal legislation and lobby Congressmen and Federal Senators in their State for support to vote against the proposal.

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Article IV, Clause 2 of the US Constitution.

There is recognition that certain matters, like defence and health need to be handled at the federal level and some matters at a global level. There are certain health issues that cannot be handled within the borders of one country but on a world level including environmental issues.¹³⁰

6.10 Federalism - Intergovernmental Relations

Intergovernmental relations have evolved throughout the history of the nation. Initially a pattern of dual federalism operated until about 1930. The powers of the National Government were exercised more or less independently from those of the State. The pattern of relationships then changed and a period of co-operative federalism which lasted to about 1960 operated and interactions among National, State, and Local Governments increased. From the 1960's through the 1970's the pattern of intergovernmental relations shifted to creative federalism. Programs were initiated to fight poverty and other social problems. The National Government provided most of the funding and the States and localities administered the programs. During these two periods there was a mixing and sharing of responsibilities between the different levels of government.

American federalism since the 1980's has entered a period of competitive federalism, and relations are more unsettled and combative. The National Government has reduced financial support to the State and Local Governments. The State Governments have felt the effects of federal cutbacks and have had to become more innovative to maintain services and deal with the financial restrictions.

6.11 The Academy for State and Local Government

The Academy for State and Local Government is an umbrella organisation for seven organisations which represent all State elected officials of the United States. The Academy is the national public policy centre of the -

- Council of State Governments;
- International City/County Management Association;
- National Association of Counties;
- National Conference of State Legislatures;
- National Governors' Association;
- National League of Cities; and
- U.S. Conference of Mayors.

Most of the organisations represent elected officials as well as some appointed city and county professional managers of the United States. The seven organisations serve as the board of trustees for the Academy for State and Local Government. These organisations attempt to influence the way legislation is drafted and passed. The group monitor legislation to see how it will impact on State and Local Government. After a Bill is introduced and referred to committee the organisations work to have some input into the Bill.

A brief description of some of the member organisations is outlined below.

¹³⁰ Dawn Hatzer, Coordinator, The Academy for State and Local Government, in Washington, D.C. meeting, 17 July 1997.

6.12 The National Conference of State Legislatures

The National Conference of State legislatures (NCSL) was founded in 1975. It is a bipartisan organisation servicing the lawmakers and staff of the nation's 50 States. The NCSL sponsors research and projects to encourage communication among legislators, other public leaders and private sector decision makers. It provides an alternative solution to State policy issues.

The Conference provides advice to legislators and assists in drafting legislation. The NCSL arranges for State legislators to testify before Congress Legislative Committees on a variety of issues. It is the States' most effective lobbying voice in Washington, D.C. between the State lawmakers and Members of Congress. The Conference arranges meetings and forums for State legislators to discuss concerns about federal legislation and federal issues with Congressional leaders, cabinet officers, key members of the Administration, and often the President.

Executive officers of the NCSL advised the Standing Committee that the NCSL has two main purposes -

- lobby Congress on issues that States agree upon; and
- provide information to members on a variety of topics.¹³¹

The NCSL conducts regular conferences to discuss issues of interest to State legislators. International delegates also attend and interact with State legislators. The Standing Committee was invited to attend and address the NCSL's next conference.

6.13 The Council of State Governments

The Council of State Governments (CSG) is a national, nonpartisan organisation which serves the executive, legislative and judicial branches of State Government. The CSG encourages private sector representative participation in CSG committee discussions with State leaders in shaping the States' approach to public policy issues.

The CSG interacts with all levels of State officials and in all three branches of State Government.

6.14 The National Governors' Association

The National Governors' Association (NGA) is a bipartisan national organisation of, by, and for the nations' Governors. Its members are the Governors of the 50 States, the Commonwealths and Territories. The NGA was founded in 1908 after the Governors met with President Theodore Roosevelt to discuss conservation issues. The Governors decided to form an association through which they could come together to discuss their mutual concerns and act collectively. In 1967 the Governors established an Office of State Federal Relations in Washington, D.C.

Through the NGA, the Governors identify priority issues and deal collectively with issues of public policy and governance at both the national and State levels. The Association's mission is to provide a forum for Governors to exchange views and experiences among themselves and a forum for Governors to establish, influence, and implement policy on national issues.

¹³¹

National Conference of State Legislatures, Washington, D.C. meeting, 21 July 1997.

6.15 The National League of Cities

The National League of Cities (NLC) is the largest and most representative organisation serving municipal governments. It was founded in 1924 as the American Municipal Association and today its members include 49 State municipal leagues and more than 1400 communities of all sizes. Through the membership of the State municipal leagues, the NLC represents more than 17600 municipalities.

The NLC encourages participation by the entire city leadership not just top officials. Through the NLC, mayors and city council members join together to establish unified policy positions, to advocate policies and share information to strengthen municipal government.

Acting on behalf of local governments, the NLC's goal includes influencing national policy and building understanding and support for cities and towns.

6.16 Conclusions

The States and the National Government accept that there is a need to harmonise laws and there is a degree of harmonisation because of the informal political process in which the NCSL plays a key role. There are procedures for voluntary harmonisation to be systemised through the Commissioners of Uniform State Laws.¹³² They produce model State legislation particularly with respect to issues of commercial law where it is regarded as important to have uniformity. The *Uniform Commercial Code* which was developed by the Commissioners was adopted in 49 of the 50 States. The Code covers all areas of commercial law.

The NCSL and other forums provide an opportunity for State legislatures to share and exchange ideas and to evaluate how a particular law or program is working in one jurisdiction.

Uniform laws are promoted by a variety of groups and there is intense lobbying. Groups such as the business sector, labour unions and environmental groups may draft a law addressing particular issues and then urge the States to adopt it.

There is a formal constitutional process for inter-State compacts. The compact process is not used very often, but there is a mechanism for States to establish a compact to deal with various issues. The States can contract or bind themselves, it is almost the equivalent to signing a treaty among themselves.

The commerce clause and foreign commerce clause in the US Constitution prohibits discrimination against inter-State and foreign commerce. The United States Supreme Court has over 200 years enforced the constitutional requirement of non-discrimination against inter-State and foreign commerce -

State laws are struck down every year if there is any kind of discrimination against commerce.¹³³

The States have been impacted on by international trade agreements. The Uruguay Round Agreement, and also NAFTA which primarily focuses on non-tariff barriers to trade, such as taxes, regulation and subsidies, involves State Government policy. The General Agreement on

¹³² The Conference of Commissioners of Uniform State Laws is an association established to consider laws of different States and make recommendations to bring about uniformity in such laws.

¹³³ Senior Officers of the National Conference of State Legislatures, Washington D.C., meeting, 21 July 1997.

Tariffs and Trade (GATT) applies international trade rules in a comprehensive way for the first time to trade in services as opposed to trade in goods. The States have no constitutional right to negotiate directly with foreign countries on provisions that affect the States. However, the States have sought to include in the GATT implementing legislation, procedures of consultation and co-operation whenever a State law measure may be challenged.

Chapter 7: Conclusions

7.1 A Federal State

A federal state is one that brings together a number of different political communities with a common government for common purposes and separate “State” or “Provincial” governments for the particular purposes of each community. Australia, the United States of America, Canada, Germany and Belgium are all federal countries. Federalism combines unity with diversity. However, governmental structures in federal countries are very different. These structures have directly impacted on the measures and methods of intergovernmental relations between the National Government and the States.

7.2 Distribution of Powers

There is not a uniform approach to the distribution of powers and the execution of powers in federal systems. Generally powers of the federal government are enumerated in a constitution and residual powers are generally assigned to the state governments. Virtually all federal constitutions provide for concurrent authority. In all cases of concurrent or shared jurisdiction, federal constitutions contain a paramountcy provision that determines which level of government will prevail in cases of conflicting legislation. Generally paramountcy falls to the federal government.

7.3 Flexibility of Federal Systems

Governments have had to adapt to international and social demands on their functions and powers. Formal constitutional amendments are a means to effect change, but federal systems have adapted their distribution of powers and functions to changing circumstances in a variety of ways.

The concurrency of powers in federal constitutions has been used to enhance flexibility. Several federal systems have constitutionally assigned to the federal government legislative authority in certain fields of jurisdiction, while leaving the executive and administrative responsibility for the delivery of programs, services or regulations to the states. Germany is an example of this type of intergovernmental delegation of powers. Another means is the temporary referral of powers by the state to the federal government. The Australian Constitution provides for the delegation of legislative authority from the State to the Federal legislature. Section 51(xxxvii) of the Australian Constitution enables the Commonwealth Parliament to legislate with respect to matters referred to it by the Parliament of any State.

Most federations provide for some form of intergovernmental agreements. Australia and Canada have had a long history of intergovernmental agreements on a wide variety of matters. Although there is no provision for intergovernmental meetings in the Australian Constitution, Ministerial Councils have been one of the principal means of facilitating intergovernmental co-operation in Australia. Co-operative agreements and conventions are also a feature of the Belgian Federal system.

Another device used has been for both the Federal and State Governments to legislate in an area where they both have jurisdiction. The Federal legislature passes uniform laws which cover the field to the extent of its jurisdiction and State legislation covers the remaining areas. An example in Australia, is the Commonwealth’s *Trade Practices Act 1974* (consumer protection provisions) complemented by various *Fair Trading Acts* in the different States and Territories of Australia.

Interstate agreements are another example of a device which allows flexibility. It permits two or more States to enter into an agreement for joint action. In the United States such a device requires Congressional consent. Such arrangements allow for the establishment of federation-wide standards in certain areas without direct intervention of the Federal Government.

7.4 Scope of Powers and Functions

The scope of government functions in the twentieth century has evidenced considerable diversity. Activities have expanded relating to international relations, the functions of the global economy, the expansion of government social activity and the relative expansion and operation of the legal system. This has required both Federal and State Governments to adopt a more co-operative approach. It has also evidenced the trend and demand for more uniform standards and laws in a variety of areas, including areas which were considered exclusively within State jurisdiction.

This trend in Australia has been evidenced by the growth of Ministerial Councils and intergovernmental agreements in a wide variety of areas. Commonwealth and State Ministers meet regularly to discuss issues and develop strategies within the scope of their portfolios.

7.5 Different Federal States

Although the countries considered in this report are federations there are important operational differences. Another fundamental difference is that unlike Australia, the United States and Germany which are countries of one basic language and culture, Canada and Belgium have more than one basic language.

Intergovernmental relations are influenced by the different systems of government. Australia and Canada with a parliamentary-cabinet governments style of government and a Westminster tradition have developed a system of Ministerial Councils to deal with a variety of federal/state issues. This development has concentrated executive powers to the exclusion of the legislatures. The United States with a presidential-congressional government and its separation of powers has developed system which relies on direct lobbying of Congressmen and more input by a variety of groups including the States into the legislative process. In Germany the States have a direct input into federal legislation as the Upper Federal Chamber is constituted by State Government members. In Germany the majority of legislation is federal while the execution and administration of legislative measures are the responsibility of the States. The German Committee system provides for direct input by the States in both international and federal/state issues. Belgium has seen a devolution of power to the States through the reorganisation of Belgium from a unitary State into a federation. Belgium has a complex organisational structure in which Members of the Community Councils are also Members of the Senate. There is also a structured system to deal with conflicts between the Federal and Federated Parliamentary Assemblies.

7.6 International Relations

The power to implement international treaties and agreements has been very contentious in many federal systems. The concern has been the extent to which an international treaty or agreement concluded by the Federal Government impinges on State jurisdiction. In Australia and the United States the power to implement treaties is primarily within the authority of the Federal Government. In Belgium both the Federal and State Governments can sign treaties and there is a structured process to deal with treaty notification and ratification. In Germany both the Federation and the States have established procedures to deal with treaties and have set up a Treaty Commission. In Canada the Federal Government has responsibility for international

agreements. However, they require provincial co-operation to implement them if they are matters within the jurisdiction of the Provinces.

7.7 Economy

Jurisdictional authority for the function of the economy is allocated in a variety of ways to either or both levels of government.

Trade and commerce is in most federal constitutions an enumerated power exclusive to the federal government. In Germany trade and commerce is a concurrent power, but the Federal Government is responsible for the vast majority of legislative responsibilities while the States are restricted largely to the execution and administration of such legislation.

A power as broad as trade and commerce is open to interpretation and has been subject to considerable judicial review, particularly in the United States and Australia. In Canada the Courts have interpreted trade and commerce to include inter-provincial and international trade and commerce.

7.8 Social Activity

Social activities such as education, health, labour and social services are areas where the State Governments have more legislative responsibility. However, Federal Governments are also involved in the broad field of social activities. Federal involvement in education is more through the provision of financial assistance either to the institutions of higher learning or to the State Governments.

Jurisdictional responsibility of health services, particularly hospitals and public health is generally a State Government responsibility. However, Federal Governments play a role. This is either through public expenditure in the delivery of health services and funding through a variety of grants.

There is considerable variation in federal system in authority over the law. Legislative authority over the criminal law is typically assigned to the Federal Government, although in the United States and Australia it is a State responsibility.

7.9 Intergovernmental Fiscal Relations

Intergovernmental fiscal relations in federal system must deal with two problems -

- Vertical fiscal imbalance which is concerned with the allocation of revenues between Federal and State Governments; and
- Horizontal fiscal imbalance which is related to the varying fiscal capacities of the individual constituent units. Often a system of equalization payments are instituted to ensure that the constituent governments have sufficient resources to provide public services at a level comparable to each other.

To address the problem of vertical fiscal imbalance in federal systems, two types of transfers have been used -

- Unconditional transfers which occur on a no-strings-attached basis, leaving the State Governments to spend federal funds in any way they see fit; and

- Conditional transfers which are funds designated by the Federal Government for specific purposes.

In the United States, the conditional transfers is the primary instrument comprising over 80 percent of all transfers from the Federal to State Governments. In Australia, and Canada a more moderate use of conditional transfers is employed, ranging from a third to one-half of all transfers. Germany is unique in employing only conditional transfers from the Federal to State Governments.

Federal spending power has permitted the Federal Government to pursue certain objectives which it could not otherwise be permitted to do through legislation.

7.10 Conclusion

All federal systems are different and there is no single uniform approach to the distribution of government powers and functions. There is an overwhelming variety of arrangements which have been employed to enumerate and allocate areas of jurisdictional authority between the levels of government in a federation.

In most federal States there is an emphasis on more complementarity and co-operation rather than separation and autonomy between constituent authorities. This type of co-operative federalism has encouraged co-operation to develop in many different, often informal ways such as intergovernmental conferences and agreements to achieve objectives. It is this development in Australia which has not seen a complementary change in procedures to ensure parliamentary involvement and scrutiny of proposed legislative measures which has been the concern of this Committee. This Committee has made a number of recommendations which are similar to procedures adopted in many other federal countries which involve informing and involving the State Parliaments in initiatives emanating from intergovernmental agreements and proposals for uniform legislation.

APPENDIX ONE**Glossary**

Throughout this report the following terminology has been used:

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|---------------------------|--|
| “Basic Law” | means the Constitution for the Federal Republic of Germany |
| “Constitutional monarchy” | means a country in which a king or queen is head of state, with powers limited by a Constitution. |
| “Federation” | means the forming of a nation by the union of a number of States which give up some of their powers to a national Parliament in return for strong representation in that Parliament. |
| “Member States” | means European countries that are members of the European Community. |
| “Parliamentary democracy” | means a system of government in which power is vested in the people, who exercise their power through elected representatives in Parliament. |
| “Select Committee” | means the Western Australian Select Committee on Parliamentary Procedures for Uniform Legislation Agreements established by the Legislative Assembly of the Western Australian Parliament on the 4 June 1992. |
| “Standing Committee” | means the Standing Committee on Uniform Legislation and Intergovernmental Agreements established by the Legislative Assembly of the Western Australian Parliament on 4 August 1993 and reestablished on 18 March 1997. |

Abbreviations

Throughout this report:

| | |
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| “AIT” | means the Agreement on Internal Trade. |
| “COAG” | means the Council of Australian Governments. |
| “COSAC” | means the Conference of European Affairs Committee. |
| “CSG” | means the Council of State Governments. |
| “DG” | means the Directorate General of the European Commission. |

| | |
|-----------|---|
| “EC” | means the European Commission. |
| “ECC” | means the European Economic Community. |
| “ECSC” | means the Treaty of the European Coal and Steel Community. |
| “EU” | means the European Union. |
| “Eurotom” | means the European Atomic Energy Community. |
| “FRG” | means the Federal Republic of Germany. |
| “GATT” | means the General Agreement on Tariffs and Trade. |
| “IGC” | means the Intergovernmental Conference of the European Union. |
| “NAFTA” | means the North American Free Trade Agreement. |
| “NCSL” | means the National Conference of State Legislatures. |
| “NGA” | means the National Governors’ Association. |
| “NLC” | means the National League of Cities. |
| “RCMP” | means the Royal Canadian Mounted Police. |
| “SCAG” | means the Standing Committee of Attorneys-General. |

APPENDIX TWO

LIST OF MEETINGS HELD DURING THE STANDING COMMITTEE'S
VISITS TO BRUSSELS, BONN, TORONTO AND WASHINGTON

| Date | Contact | Organisation |
|---------------------------|--|---|
| BRUSSELS - BELGIUM | | |
| 7/7/97 | <i>Colin Milner</i> | First Secretary, Australian Embassy and Mission to the European Union. |
| | <i>Jose Borrell</i> | Head Unit for Relations with Australia, DGI, European Commission. |
| | <i>Peter Meyer</i> | Foreign Policy Advisor, Central Policy and Planning, External Political Relations DGIA, European Commission - Foreign Policy. |
| | <i>Matthew King</i> | Administrator dealing with Internal Market, Insurance and Pension Funds and External Aspects of Financial Services, DG XV, European Commission. |
| | <i>Helmult Schroter</i> | Head of Unit, Legal and Procedural Problems, General Competition Policy and Coordination, DGIV, European Commission. |
| | <i>Elisabetta Manunea</i> | Unit for Legal and Procedural Problems, General Competition Policy and Coordination, DGIV, European Commission. |
| | <i>Caroline Walcot</i> | Deputy Secretary General, European Round Table - Competition Policy from the Company Perspective. |
| | <i>Lothar Kuhl</i> | UCLAF, Secretariat General of the European Commission on Criminal Law Approximation in the European Union, Financial Crime - Antifraud. |
| | <i>Senator, the Hon. Margaret Reid</i> | President of the Senate - Australian Senate. |
| 8/7/97 | <i>Senator Michel Foret</i> | Leader of the Liberal Party in the Belgium Senate and Member of the Parliament Régional Walloon and the Conseil de la Communauté Française. |

| Date | Contact | Organisation |
|-----------------------|---|---|
| 8/7/97 | <i>Annemie Neyts - Uyttebroeck, MEP</i> | Member of the European Parliament's Institutional Affairs Committee and Rapporteur for the Committee Report on Relations between the European Parliament and National Parliaments. |
| | <i>Antonio Sacchetti</i> | Director, Legal Service, General Secretariat of the Council of the European Union. |
| | <i>Roelof Plijter</i> | Deputy Head of Unit, Directorate M, External Economic Relations, Commercial Policy, Relation with North America, the Far East, Australia and New Zealand, DGI, European Commission. |
| | <i>Don Kenyon</i> | Ambassador of the Australian Embassy and Mission to the European Union. |
| | <i>Pamela Brumter</i> | Chief of the Directorate General on Industry European Commission, Governments, Protocol and Uniform Legislation. |
| | <i>Jane Drake-Brockman</i> | Minister, Australian Embassy and Mission to the European Union. |
| | <i>Justine McPhillips</i> | Counsellor, Australian Embassy and Mission to the European Union. |
| | | Belgium Parliament. |
| BONN - GERMANY | | |
| 9/7/97 | <i>Dr Uwe Leonardy</i> | Lower Saxony State Office, Bonn, Uniform Legislation, Federalism and the European Union. |
| 10/7/97 | <i>Gustav Wabro</i> | State Secretary from the State of Baden-Wurttemberg - Bundesrat, Bonn. |
| | <i>Mrs Krause-Sigle</i> | Head of Competition Policy Sub-division at the Federal Economics Ministry, Bonn. |
| | <i>Michael Baron</i> | Head of Division on Competition Policy, Bonn. |
| | <i>Manfried Steffen</i> | Senior Expert on Asia-Pacific Region at the Federal Ministry of Economics. |

| Date | Contact | Organisation |
|-------------------------|--------------------------------|---|
| 10/7/97 | <i>Wendy Marth</i> | Projects Officer, Australian Embassy, Bonn. |
| | <i>Dr Horst Risse</i> | Head of Bundesrat Speaker's Office, Bonn. |
| 11/7/97 | | Bundesrat, Upper States House, Bonn. |
| TORONTO - CANADA | | |
| 14/7/97 | <i>Professor Fred Lazar</i> | Professor of Economics, Faculty of Arts, York University School of Business. |
| | <i>Daniel Schwanen</i> | Senior Policy Analyst at the C D Howe Institute - Toronto. |
| | <i>Sean R Peterson</i> | Policy Analyst at the Canadian Chamber of Commerce - Toronto. |
| | <i>Peter Kane</i> | Consul-General and Senior Trade Commissioner at the Australian Consulate General and Trade Commission, Toronto, Canada. |
| | <i>Marie Ross</i> | Personal Assistant to the Consul General, Toronto, Canada. |
| 15/7/97 | <i>Professor David Cameron</i> | Department of Political Science at the University of Toronto - Uniform Legislation, and Intergovernmental Affairs. |
| | <i>William Forward</i> | Assistant Deputy Minister at the Office of Constitutional Affairs and Federal-Provincial Relations, Ministry of Intergovernmental Affairs - Toronto. |
| | <i>Craig McFayden</i> | Director, Office of Constitutional Affairs and Federal-Provincial Relations, Strategic Issues Group, Ministry of Intergovernmental Relations - Toronto. |
| | <i>Mark Polley</i> | Executive Assistant to the Assistant Deputy Minister - Uniform Legislation, Intergovernmental Agreements and Treaties - Toronto. |
| | <i>John D Gregory</i> | General Counsel, Cabinet Office, Immediate Past President of the Uniform Law Conference of Canada - Toronto. |

| Date | Contact | Organisation |
|-------------------------|------------------------------|--|
| WASHINGTON - USA | | |
| 17/7/97 | <i>Dawn Hatzer</i> | Coordinate of the Academy for State and Local Government - Washington, DC. |
| | <i>Charles Stark</i> | Section Chief, Foreign Commerce Section, Antitrust Division, Justice Department - Washington. |
| | <i>Ed Hand</i> | Assistant Section Chief, Foreign Commerce Section, Anti-trust Division, Justice Department - Washington. |
| | <i>Milton Marquis</i> | Senior Counsel to the Assistant Attorney General Anti-trust Division, US Department of Justice - Washington. |
| | <i>Gregory J Werden</i> | Director of Research, Chief Appellate Liaison Unit, Economic Analysis Group, Antitrust Division, US Justice Department - Washington. |
| 18/7/97 | <i>Jacques Feullian</i> | Asia - Pacific Regional Counsel, International Division, Federal Trade Commission, Bureau of Competition. |
| | <i>Michael O. Wise</i> | Advocacy Coordinator, Bureau of Economics, Federal Trade Commission - Washington. |
| | <i>Mary Michaels</i> | Assistant Advocacy Coordinator, Bureau of Economics, Federal Trade Commission, Washington. |
| 21/7/1997 | <i>Kathy Brennan-Wiggins</i> | Director, International Programs, National Conference of State Legislatures - Washington, DC. |
| | <i>Bill Waren</i> | Convener of the Trade and Agriculture Committees - Product Liability Laws. |
| | <i>David C Naftzger</i> | Staff Assistant, International Programs, National Conference of State Legislatures - Washington, DC. |
| | <i>Charles R Thomson</i> | Special Agent in Charge, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms Criminal Enforcement. |

| Date | Contact | Organisation |
|-----------|--------------------------|---|
| 21/7/1997 | <i>James O Pasco Jnr</i> | Assistant Director/Congressional and Media Affairs, US Treasury Department, Bureau of Alcohol, Tobacco and Firearms - Uniform Firearm Laws. |
| | <i>Andrew Peacock</i> | Australian Ambassador to the USA, Washington, DC. |
| | <i>Glenys Maguire</i> | Secretary to the Australian Ambassador. |

APPENDIX THREE

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