

'The Fear of Insignificance': New Perspectives on Harmonising Police Cooperation in Europe and Australia

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Abstract

Despite the fact that Australia and the European Union (EU) have different structures of governance, histories, and cultures, both entities face remarkably similar problems in relation to police cooperation across borders. Australia is divided in nine different criminal jurisdictions, each of them policed by its own police force. Problems of border crossing, information exchange and joint investigations therefore arise similar to those in the EU. These problems have intensified in the 20th century with globalisation and the increased mobility of offenders. Several strategies, both legal and administrative, have necessarily developed to secure inter-state borders. Many of these strategies, like joint investigation teams, common databases and mutual recognition can be compared to solutions developed in the EU. This article will analyse some of the strategies that have been developed in Australia and in the EU to out-balance the lack of borders within them. It will be discussed what the major common impediments to police cooperation are in both entities. As many problems of cross-border policing result from the fact that law enforcement strategies are purely regional, it will be explored how more advanced cooperation strategies could be harmonised at the EU and Australian Federal levels. The major inhibiting factor in relation to harmonisation of legal frameworks in both entities will be defined as 'the fear of insignificance' or the fear of state actors to lose their individual identities in the process of harmonisation.

Keywords

Police cooperation; Harmonisation; European Union; Australia

THIS ARTICLE FOCUSES ON POLICE COOPERATION, SPECIFICALLY INVOLVING AN examination of the similarities and differences between Australian and European Union (EU) strategies and the prospect for legal harmonisation in this field. Police cooperation is an important issue in both systems since, unlike criminals, police agencies are territorially-bound and struggle with significant legal and operational barriers to working across borders. Problems of cooperation arise for Australia and the EU since both comprise a number of distinct legal jurisdictions that do not have uniform or common laws governing criminal procedure, substantive offences and police laws. This article examines the concept and strategies of legal harmonisation employed in these two systems to promote more effective cross-border police cooperation. Harmonisation is defined broadly in this article as encompassing the promotion of legal uniformity or the creation of overarching legal frameworks, as well as 'softer' measures, such as the approximation of standards and practices through common training initiatives and institutions that facilitate police cooperation and information exchange.

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The comparison identifies the challenges to harmonisation processes in both Australia and the EU, focusing on the role of state actors and police practitioners. These two groups do not necessarily welcome legal harmonisation. Police practitioners may resist harmonisation because it adds another layer of bureaucratic complexity and inhibits established (informal) processes of cooperation, while states in turn may resist harmonisation because it infringes upon sovereign powers of law-making in a field which is traditionally regarded as the heartland of national sovereignty. At the state and practitioner levels, the question arises whether resistance to harmonisation of cooperation strategies across-borders is more evident in a supranational union such as the EU, or in a federation, such as Australia. Even though there are constitutional differences between these systems, cross-border cooperation could be enhanced by the adoption of similar solutions and strategies. The article highlights the distinctive features of cooperation strategies adopted in Australia and in the EU, specifically examining whether the approaches introduced in one system could usefully inform the development of policy in the other.

Australia is a federal state and is divided into nine different criminal jurisdictions¹, each of them policed by its own law enforcement agencies.² Although Australia and the EU have very different structures of governance, histories, and cultures, both systems face surprisingly similar problems in relation to police cooperation across-borders. In both systems, the importance of police cooperation across jurisdictional boundaries has intensified in the late 20th century with the gradual abolition of borders, globalisation and the increased mobility of offenders.³ Several strategies, both legal and administrative, have been developed as a response in both systems to secure external and internal borders. In Australia and in the EU, these measures have included the formation of cross-jurisdictional joint investigation teams, the creation of common information databases and the mutual recognition of criminal procedural requirements, such as surveillance and arrest warrants.

EU and Australian legal frameworks in the field of police cooperation

With a multitude of legal competences to deal with crime spread across different jurisdictions in Australia and the EU, a 'patchwork' system of cooperation strategies and laws has emerged. As part of this 'patchwork', some jurisdictions are further advanced in developing their links with other jurisdictions. Since the 1950s, many neighbouring states within Europe have exercised their inherent sovereign right to enter into bilateral and multilateral treaties and agreements to enhance cross-border cooperation. The legal norms governing cross-border cooperation today are a mixture of regional international treaties and agreements, and EU law. The latter has produced a number of EU initiatives aimed at improving cooperation and establishing minimum standards in specific areas, such as information exchange.⁴ Due to the resulting diversity of bilateral, multilateral and

¹ Six states, two territories and an overarching federal jurisdiction. For a discussion of the growth of federal criminal law and jurisdiction, see S. Bronitt and B. McSherry, *Principles of Criminal Law* (Thomson Reuters, 2010), pp 103-106.

² M. Finnane, *Police and Government: Histories of Policing in Australia* (Oxford University Press, 1994), pp 14-23.

³ See for example Bowling, 'Transnational Policing: The Globalization Thesis, a Typology and a Research Agenda', (2009) 3(2) *Policing* 149; H. Busch, *Grenzenlose Polizei? Neue Grenzen und Polizeiliche Zusammenarbeit in Europa* (Dampfböck Verlag, 1995), pp 285-319. In relation to the impact of globalisation on policing see generally Reiner, 'Policing in a Post-Modern Society', (1992) 55(6) *The Modern Law Review* 761 cited in Kempa, Stenning and Wood, 'Policing communal spaces: A reconfiguration of the 'mass private property' hypothesis' (2009) 44 *British Journal of Criminology* 562, 565-566; A. Wakefield and J. Fleming (eds), *The SAGE Dictionary of Policing* (Sage, 2009), pp 70-71 and 124-126. See in relation to Australia: Report of the Leaders Summit on Terrorism and Multijurisdictional Crime *Cross-Border Investigative Powers for Law Enforcement* November 2003, i-v.

⁴ See for example M. Böse, *Der Grundsatz der Verfügbarkeit von Informationen in der strafrechtlichen Zusammenarbeit der Europäischen Union* (Bonn University Press, 2007), pp 21-49; V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), pp 235-279.

EU strategies, the creation of an overarching legal framework has frequently been discussed in the EU in recent years.⁵ Since the Treaty of Lisbon, with its agenda of enhancing cooperation in a range of fields, this debate has become even more topical.⁶

The development of police cooperation in the EU in the last 20 years is impressive considering that many of its current members were in a state of war less than 70 years ago.⁷ The purpose of economic union in the 1957 Treaty of Rome was to prevent future wars among these states by including them in one entity with common interests and goals.⁸ These goals were mainly economic when the European Economic Community (EEC) of 1958 was established; a common security policy was at that stage not envisaged.⁹ However, economic cooperation culminated in the signing of the Single European Act¹⁰ on 28 February 1986, which intensified the process of economic integration by abolishing the internal borders between Member States (Article 8A). The Treaty on European Union (TEU)¹¹ that entered into force on 1 November 1993 then addressed law enforcement cooperation between the Member States in Title VI on Co-operation in the Field of Justice and Home Affairs (JHA), which was a significant step towards a harmonised EU framework on police cooperation.¹² Article 29 of the TEU prescribed that citizens should be provided with a high level of safety within an Area of Freedom, Security and Justice by preventing and combating crime in particular among others terrorism, through closer cooperation between police forces, customs authorities and other competent authorities in the Member States.¹³

The existing police cooperation strategies between EU Member States today go far beyond the initial EEC Treaty aims of creating peace, economic prosperity and stability. Advanced bilateral and multilateral cooperation initiatives have developed amongst the Member States and this has required the partial surrender of sovereignty rights in order to facilitate the exercise of powers by law enforcement officials on foreign territory.¹⁴ This development is particularly remarkable as policing is one of the most 'sovereignty sensitive' functions of a nation-state.¹⁵ Furthermore, cooperation strategies were developed notwithstanding the existence of divergent cultures, structures, languages and

⁵ See in relation to the harmonisation of criminal law and third pillar measures for example V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), pp 59-110; A. Klip, *European Criminal Law. An Integrative Approach* (Intersentia, 2009); A. Klip and H. van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law* (Royal Netherlands Academy of Arts and Sciences, 2002); P. Asp 'Harmonisation and Cooperation within the Third Pillar. Built-in Risks' (1999) 4 *Cambridge Yearbook of European Legal Studies* 15.

⁶ See for example Ladenburger, 'Police and Criminal Law in the Treaty of Lisbon. A New Dimension for the Community Method', (2008) 4(1) *European Constitutional Law Review* 20.

⁷ M. Dedman, *The Origins and Development of the European Union, 1945-1995: A History of European Integration* (Routledge, 1996), pp 10-11; J. Pinder and S. Usherwood, *The European Union: A Very Short Introduction* (Oxford University Press, 2007), pp 1-3.

⁸ Preamble to the Treaty establishing the European Coal and Steel Community, Treaty of Paris of 18 April 1951, entered into force on 25 July 1952; P. Craig and G. de Búrca, *EU Law, Text, Cases and Materials* (Oxford, 2007), p 7; J. Pinder and S. Usherwood, *The European Union: A Very Short Introduction* (Oxford University Press, 2007), pp 3-6.

⁹ See Preamble to the Treaty establishing the European Economic Community, Treaty of Rome of 25 March 1957, entering into force on 1 January 1958; J. Pinder and S. Usherwood, *The European Union: A Very Short Introduction* (Oxford University Press, 2007), pp 3-6.

¹⁰ *Official Journal of the European Communities* (Hereafter: OJ) L 169, 29 June 1987.

¹¹ OJ C 191, 29 July 1992.

¹² J. Monar, N. Neuwahl, D. O'Keeffe and W. Robinson, *Butterworths Expert Guide to the European Union* (Butterworths, 1996), p 247; Fijnaut, 'Police Co-operation and the Area of Freedom, Security and Justice', in N. Walker (ed), *Europe's Area of Freedom, Security and Justice* (Oxford University Press, 2004), pp 241-242.

¹³ Consolidated version of the Treaty on European Union. OJ C 325/5 of 24 December 2002, p. 21.

¹⁴ See in relation to the Belgium, German, Dutch Cooperation in the common border region Spapens, 'Policing a European Border Region: The Case of the Meuse-Rhine Euroregion', in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate, 2008), pp 225-226; See more generally J. Sheptycki, *Policing Postmodernism and Transnationalisation* (1996) Paper presented to the Symposium on New Forms of Government, University of Toronto (October 1996, unpublished), 10.

¹⁵ Wallace, 'The Sharing of Sovereignty: the European Paradox', (1999) XLVII *Political Studies* 503, 509-510.

histories of police organisations in those Member States.¹⁶ Today, police cooperation across the 27 Member States of the EU has developed to the point that it can even be compared with cooperation within a federal system such as Australia.

With the emergence of European terrorism in the 1970s, police cooperation became increasingly a focus of attention for law-makers, as well as police and policy practitioners.¹⁷ This led to the development of a number of intergovernmental initiatives, one of the earliest developments being the establishment of the TREVI Group in 1976.¹⁸ TREVI was an intergovernmental forum that dealt with a range of issues, not limited exclusively to terrorism, in regular meetings at ministerial and officer level.¹⁹ This institution is comparable to Australian developments in the field of cooperative federalism, for example, within the framework of the Council of Australian Governments (COAG), the intergovernmental Ministerial Council for Police and Emergency Management – Police (MCPEMP), as well as regular inter-police agency meetings of the Senior Officers Group (SOG) and the Police Commissioners' Conference (PCC).²⁰

Since the Federation of the Australian Colonies in 1901, Australia does not have enforced border controls between its states and territories.²¹ The nine different jurisdictions work under their own distinct criminal laws and criminal procedures. Each state and territory has its own policing agencies with territorial competences, which are overlaid by federal law enforcement agencies and competences, principally the Australian Federal Police (AFP) and the Australian Crime Commission (ACC).²² There is no national legislation establishing common policing regulations, standards, practice or policy, and there is no direct federal control of the various state or territory police agencies.²³ Nevertheless, intergovernmental national meetings of Police Ministers, Police Commissioners, Senior Officers and other representatives of the states, territories and the Commonwealth regularly take place to promote coordinated responses to policing and security issues of national importance.²⁴

¹⁶ B. Heberton and T. Thomas, *Policing Europe: Co-operation, Conflict and Control*, (St. Martin's Press, 1995), pp 24-37. By now, these differences can be observed amongst 27 Member States.

¹⁷ H. Busch, *Grenzenlose Polizei? Neue Grenzen und Polizeiliche Zusammenarbeit in Europa* (Dampfböck Verlag, 1995), pp 285-292.

¹⁸ B. Heberton and T. Thomas, *Policing Europe: Co-operation, Conflict and Control*, (St. Martin's Press, 1995), pp 70-72; C. Joubert and H. Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights* (Kluwer Law International, 1996), pp 38-39; Klosek, 'The development of international police cooperation within the EU and third party states: a discussion of the legal bases of such cooperation and the problems and promises resulting thereof', (1999) 14 *American Universities International Law Review* 599, 612-619; See in relation to the origins of the name TREVI: J. Occhipinti, *The Politics of EU Police Cooperation – Towards a European FBI* (Lynne Rienner Publishers, 2003), p 31: one explanation is that TREVI was named after the Trevi fountain in Rome where the original agreement was concluded, another that it was a play on words on the name of the first Dutch chairman in 1976, A.R. Fonteijn, and a third that it is an acronym for the French 'terrorism, radicalisme, extrémisme et violence internationale'.

¹⁹ B. Heberton and T. Thomas, *Policing Europe: Co-operation, Conflict and Control*, (St. Martin's Press, 1995), pp 70-72; C. Joubert and H. Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights* (Kluwer Law International, 1996), pp 38-39.

²⁰ See outline at Australian Attorney-General's Department Homepage at <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP286BA8F5F45D18D6CA2571D50003D66FB>, retrieved 13 May 2010.

²¹ *Commonwealth of Australia Constitution Act 1900* (UK) (hereafter the *Constitution*).

²² M. Finnane, *Police and Government: Histories of Policing in Australia* (Oxford University Press, 1994), p 7; in 2010 ASIO, the Australian Intelligence Office was further granted enforcement powers.

²³ This is subject to the qualification that the AFP is contracted by the ACT Government to provide policing for the Australian Capital Territory.

²⁴ C. Edwards, *Changing Policing Theories for 21st Century Societies* (Federation Press, 2005), pp 31-33; A recent example is the national response to serious and organised crime, which has led to the widening of the federal criminal law and powers of the ACC. It has also led to the adoption of tougher offences at the state level: see S. Bronitt and B. McSherry, *Principles of Criminal Law* (Thomson Reuters, 2010), Ch 15.

The competences of the AFP are strictly limited by federal statute.²⁵ The legislative competences of the Commonwealth of Australia are determined in Chapter I, Part V of the Constitution, while the competences of Australian states and territories are contained in Chapter V.²⁶ The Constitution recognises autonomy in relation to legislative powers for the states and territories.²⁷ This has similar effects in practice to the distribution of power between the EU and the Member States, and amongst Member States *inter se*. By cooperating with other states and territories, for example by exchanging information or allowing foreign police on one's territory and state, territorial sovereignty in relation to criminal matters and law enforcement is similarly challenged in Australia and in the EU.²⁸ Since 2000 there has been a more determined effort to overcome police cooperation problems in Australia. The primary focus has been on facilitating information exchange between police agencies through the CrimTrac national database and regulating covert operations (called "controlled operations") across-borders through mutual recognition measures.²⁹

Comparing the EU and Australia in the field of police cooperation

In the EU, the academic literature examining police and judicial cooperation through harmonisation is vast.³⁰ By comparison, the equivalent Australian literature is underdeveloped, with limited academic commentary on the topic. There is more extensive material in the field of harmonisation of model criminal laws, and over the past two decades, there has been a succession of discussion papers and reports covering a wide diversity of substantive criminal law topics with a view to completing a Model Criminal Code for Australia. There has been significant scholarly engagement with these reform proposals.³¹ However, the only significant analysis examining the 'harmonisation' of cross-border police cooperation laws in Australia remains a 2003 discussion paper and report called *Cross-Border Investigative Powers for Law Enforcement*. This governmental report was prepared by an *ad hoc* group, the Joint Working Group on National Investigative Powers, following a Leaders Summit on Terrorism and Multijurisdictional Crime held in 2002 to address Australia's legal capabilities in this area. The report recommended the introduction of model laws to achieve consistency in the mutual recognition of laws between Australian states and territories across a wide domain of law enforcement

²⁵ See Section 8 of the *Australian Federal Police Act 1979* (Cth).

²⁶ See *Constitution* at <http://www.aph.gov.au/SEnate/general/constitution/index.htm>.

²⁷ See in relation to the special standing of territories in Australia Chapter VI, section 122 of the *Commonwealth of Australia Constitution Act 1900* (UK).

²⁸ A. Sutton and S. James, 'Evaluation of Australian Drug Anti-Trafficking Law Enforcement', (1996) *Australasian Centre for Police Research*, Report Series Number 128, 100-104.

²⁹ Report of the Leaders Summit on Terrorism and Multijurisdictional Crime *Cross-Border Investigative Powers for Law Enforcement* November 2003, i-v.

³⁰ See for example V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), pp 59-110; A. Klip, *European Criminal Law. An Integrative Approach* (Intersentia, 2009); A. Klip and H. van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law* (Royal Netherlands Academy of Arts and Sciences, 2002); P. Asp 'Harmonisation and Cooperation within the Third Pillar. Built-in Risks' (1999) 4 *Cambridge Yearbook of European Legal Studies* 15.

³¹ Mathew Goode, one of the key governmental lawyers involved in the projects, has published widely on the progress of the Model Criminal Code: see Goode, 'Codification of the Australian Criminal Law', (1992) 16 *Criminal Law Journal* 5; Goode, 'Constructing Criminal Law Reform and the Model Criminal Code', (2002) 26 *Criminal Law Journal* 152; Goode, 'Codification of the Criminal Law', (2004) 28 *Criminal Law Journal* 226. Other scholars have been more critical of the lack of implementation of the Code, see Gani, 'Codifying the Criminal Law: Implications for Interpretation', (2005) 29 *Criminal Law Journal* 264. One of the leading textbooks, S. Bronitt and B. McSherry, *Principles of Criminal Law* (Thomson Reuters, 2010), makes extensive use of the Model Criminal Code recommendations in Chapters 2 and 15.

including controlled operations, assumed identities, witness protection and surveillance warrants.³²

Both the EU and Australia are similarly committed to creating overarching legal frameworks regulating police cooperation. In Australia, this goes further, including the promotion of uniformity of laws between the Commonwealth, states and territories. This article highlights the challenges arising from the 'patchwork' of legal frameworks governing cooperation strategies, and the obstacles to effective harmonisation in both systems.

The first part of the article introduces the key concepts relevant to the harmonisation of legal frameworks in the field of police cooperation in both systems, such as the actors involved and their power to inhibit the development of harmonisation and legal uniformity. The second part of the article describes the evolution of regional and harmonised police cooperation in Australia and in the EU. Two case studies will be assessed in relation to each system. One case study focuses on regional cooperation, whilst another addresses a harmonised strategy. The outcomes will be compared in the final part of the article to determine in which of the two systems harmonisation is more likely to develop.

Key concepts relevant to the harmonisation of legal frameworks in the field of police cooperation

Actors in the field of police cooperation

Two actors can be distinguished in the field of police cooperation in Australia and in the EU: practitioners working across jurisdictional boundaries and states entering into cross-jurisdictional treaties and agreements to support this cooperation. At the bilateral and multilateral levels, a number of progressive multi-jurisdictional cooperation arrangements have been developed by practitioners and supported by legal agreements between states.³³ However, resistance of these actors could be observed towards the harmonisation of laws, standards and practices at the EU and Australian federal levels.³⁴

Practitioners have expressed fears that the harmonisation of laws regulating police cooperation and the creation of common frameworks and institutions reduces the efficiency of cross-border policing. According to interviews with Australian practitioners, the creation of a uniform criminal procedural law is perceived to result in the restriction of their powers. A general preference exists for informal cooperation, rather than regulation under a common legal framework.³⁵ Similar attitudes can be observed in relation to police

³² See the Report of the Leaders Summit on Terrorism and Multijurisdictional Crime, *Cross-Border Investigative Powers for Law Enforcement*, November 2003 and related Discussion Papers in the different Australian Jurisdictions.

³³ See for example in relation to the EU the Meuse-Rhine Euroregion Cooperation Spapens, 'Policing a European Border Region: The Case of the Meuse-Rhine Euroregion', in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate, 2008); See in relation to Australia the NPY Lands Cooperation, as for the first time outlined, Fleming, 'Policing Indigenous People in the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Lands', in Hufnagel, S., Bronitt, S. and Harfield, C. (eds), *Cross-Border Law Enforcement Regional Law Enforcement Cooperation - European, Australian and Asia-Pacific Perspectives* (Routledge, 2010) (Forthcoming).

³⁴ See below Europol and CrimTrac case studies.

³⁵ Interviews have been conducted with Australian police officers, commissioned and non-commissioned, from several federal and state police agencies. Interviews conducted with officers in the Australian Federal Police, CrimTrac and Victoria Police in particular, stressed the preferences outlined here. However, there was a general agreement on the advantage of legal harmonisation in the field of criminal procedural law. Fears were more prominent in relation to the particular standards that could be harmonised and the lowering of enforcement powers.

cooperation in the EU. It was stressed in interviews with EU practitioners that the establishment of EU legal frameworks creates another level of bureaucracy potentially slowing down processes of cooperation.³⁶ In line with the Australian practitioners, interviewees in the EU emphasised the advantages of informal cooperation.³⁷ However, in both systems practitioners emphasised that they would welcome harmonisation that enhances cooperation practice and specifically tackles existing difficulties.³⁸ While these findings do not lead to the conclusion that practitioners inhibit harmonisation processes, their perceptions need to be taken into account with a view to enhancing harmonisation in both systems.

Harmonisation can be inhibited by the lack of agreement on or implementation of common legal frameworks by state actors. These are EU Member States in the EU and Australian states and territories in Australia. Due to the sovereignty-sensitive area of state security in which police cooperation is positioned, most decisions to establish common legal frameworks are intergovernmental and require the consensus of all state actors, which is difficult to achieve among 27 EU Member States or nine Australian jurisdictions.³⁹ The willingness of states to cooperate with a view to the creation of harmonised legal frameworks is therefore of crucial importance. Furthermore, harmonised legal frameworks that were once established, for example, in the form of a Convention in the EU or 'model laws' in Australia, need to be implemented uniformly by all states within the systems.⁴⁰ The case studies below will assess whether processes of intergovernmental agreement and the implementation of harmonised legal frameworks are hampered by the behaviour of state actors.

Theoretical framework: the 'fear of insignificance'

This article does not predominantly deal with the practitioner level, but rather with the issue of barriers to 'state-to-state' cooperation. The underlying presumption is that notwithstanding the obvious loss - or due to the obvious loss - of state sovereignty in both systems to the federal and supranational level respectively, Australian states and territories and EU Member States have resisted the trends towards centralisation or at least more centralised coordination by opposing harmonisation processes.⁴¹

This article broadly applies concepts derived from social psychology to explain state behaviour towards police cooperation. The 'fear of insignificance' is a psychological concept that applies to individuals, but also seems apt to describe the reaction of state

³⁶ On the EU side, interviews were conducted with practitioners involved in cross-border cooperation for example in the Common German-French Centre for Police and Customs Cooperation in Kehl, Germany, the Bureau for Euregional Cooperation in Maastricht, The Netherlands, with EU liaison officers, a Europol official and senior officers coordinating cooperation at the German-Dutch border and in the Scandinavian countries.

³⁷ *ibid.*

³⁸ All practitioners interviewed in Australia and the EU generally agreed that harmonisation could enhance cooperation. However, they stressed that harmonised legal frameworks needed to take into account the realities of police cooperation, rather than watering down existing standards and creating further bureaucratic hurdles.

³⁹ See for example in relation to decision-making processes in the EU V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), p 9; in relation to Australian law-making processes on the Commonwealth as well as the state and territory levels, see Chapters I and V of the *Constitution*.

⁴⁰ See for example in relation to the Schengen Convention C. Joubert and H. Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights* (Kluwer Law International, 1996), p 6; and in relation to Australian model laws Report of the Leaders Summit on Terrorism and Multijurisdictional Crime *Cross-Border Investigative Powers for Law Enforcement*, November 2003, i-xx; since the Lisbon Treaty harmonisation can now take place in the form of binding 'directives', which nevertheless still require implementation by EU member states.

⁴¹ This is a long-standing conflict in the field of European criminal law. See V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), p 1.

entities in this field when confronted with loss of power over crime matters, which is traditionally the heartland of domestic and local politics in both Australian states and territories and EU Member States. A correlation could exist between the degree of individual identity that is granted to a state by the overarching entity (EU, Australian federal state) and the way this entity acts in the context of police cooperation. The presumption is that the higher the granting of individuality to a state actor by the overarching entity, the more likely the state actor is to cooperate. The analysis is informed by the Freudian concepts used by Ignatieff in his theory of “the narcissism of minor difference”⁴² and the idea that despite the change in culture, identity remains as a prominent issue and will not adapt despite cultural change.⁴³ Further research informing the final analysis of this article has been conducted by Wenzel *et al.* in relation to the in-group projection model. According to Wenzel *et al.*, sub-groups formed under the umbrella of a super-ordinate group enter into conflict and competition in relation to their prototypicality (individuality) rather than developing better sub-group relations.⁴⁴ According to this research, sharing a common super-ordinate identity is not sufficient to develop positive sub-group relations, though similar sub-groups could develop positive relations more easily than dissimilar sub-groups.⁴⁵ This assertion will be tested contrasting the Australian cooperation model to the EU framework.

The concept of legal harmonisation in Australia and in the EU

The EU and Australia have likewise used mutual recognition and harmonisation of laws to promote police cooperation.⁴⁶ While mutual recognition requires acceptance of the laws of one jurisdiction in another jurisdiction, harmonisation promotes the adoption of common legislation or model laws across all jurisdictions. The two processes are generally inter-dependent: as it is commonly claimed in the EU context, the establishment of mutual recognition of criminal procedural laws cannot occur without the harmonisation of certain standards.⁴⁷

Harmonisation is a process aiming at a certain level of approximation of aspects of laws rather than uniformity.⁴⁸ The aim of harmonisation is not to create a single authority on any particular area of law; however, it seeks to coordinate different legal systems by eliminating major differences and creating minimum standards.⁴⁹ In Australia, it is often described as promoting ‘reasonable consistency’ across jurisdictions.⁵⁰ This article focuses predominantly on the concept of legal harmonisation, but also addresses mutual

⁴² Ignatieff, ‘Nationalism and the narcissism of minor difference’, (1995) 102(1) *Queens Quarterly* 13.

⁴³ Moore, ‘Beyond the cultural argument for liberal nationalism’, (1999) 2(3) *Critical Review of International Social and Political Philosophy* 26.

⁴⁴ Wenzel, Mummendey and Waldzus ‘Superordinate identities and intergroup conflict: The ingroup projection model’, (2007) 18 *European Review of Social Psychology* 331.

⁴⁵ *ibid.*

⁴⁶ See Vermeulen, ‘How far can we go in applying the principle of mutual recognition’, in C. Fijnaut and J. Ouwerkerk, *The Future of Police and Judicial Cooperation in the European Union* (Martinus Nijhoff Publishers, 2010), pp 241-257 and Report of the Leaders Summit on Terrorism and Multijurisdictional Crime *Cross-Border Investigative Powers for Law Enforcement*, November 2003, i-xx.

⁴⁷ See Vermeulen, ‘How far can we go in applying the principle of mutual recognition’, in C. Fijnaut and J. Ouwerkerk, *The Future of Police and Judicial Cooperation in the European Union* (Martinus Nijhoff Publishers, 2010), pp 241-257.

⁴⁸ See lately in relation to the Lisbon Treaty: Borgers, ‘Functions and Aims of Harmonisation after the Lisbon Treaty, A European Perspective’, in C. Fijnaut, and J. Ouwerkerk (eds), *The Future of Police and Judicial Cooperation in the European Union* (Martinus Nijhoff Publishers, 2010), p 348.

⁴⁹ *ibid.*

⁵⁰ Goode, ‘Codification of the Australian Criminal Law’, (1992) 16 *Criminal Law Journal* 5; Goode, ‘Constructing Criminal Law Reform and the Model Criminal Code’, (2002) 26 *Criminal Law Journal* 152; Goode, ‘Codification of the Criminal Law’, (2004) 28 *Criminal Law Journal* 226. Other scholars have been more critical of the lack of implementation of the Code, see Gani, ‘Codifying the Criminal Law: Implications for Interpretation’, (2005) 29 *Criminal Law Journal* 264.

recognition, for example where its implementation into state and territory jurisdictions is promoted by Australian model laws.

EU legal frameworks impacting on police cooperation between Member States

General

It is much debated whether the abolition of borders in the EU actually heightened the risks of cross-border crime, and therefore justified enhanced cooperation under the Schengen Convention⁵¹, or whether the moves towards greater cooperation purely followed political rhetoric.⁵² It can generally be determined that suspected criminals entering neighbouring countries, and thereby another jurisdiction, leads to difficulties for the police pursuing them to obtain an arrest warrant, gain permission to continue the pursuit or general assistance of the police from the country entered.⁵³ A heightened significance of police cooperation in the EU in the last 20 years can probably be attributed to a number of factors apart from the anticipated rise of cross-border crime with the abolition of borders, like for example, the effects of globalisation, terrorism, organised crime and generally the increased mobility of offenders.⁵⁴ Since the 1980s, national police agencies increasingly relied upon efficient cooperation with the police and law enforcement authorities of neighbouring countries to pursue trans-national criminals effectively and to fight the threats of criminality and terrorism.⁵⁵ More than ever before, problems became evident in relation to different laws but also divergent cultures, structures and histories of police organisations.⁵⁶

The numerous harmonised EU police cooperation frameworks can be divided into two main categories: regional initiatives that have worked their way up to the EU level – or cooperation between EU Member States – and EU frameworks influencing the cooperation

⁵¹ See Convention Implementing the Schengen Agreement (1990) at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922\(02\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):EN:HTML); note that the Convention is only being enforced since 1995 and was extended to all EU Member States in 1998 via the Schengen Protocol to the Treaty of Amsterdam (OJ L 239 of 22 September 2000, pp. 1-473); J. Monar, N. Neuwahl, D. O'Keeffe and W. Robinson, *Butterworths Expert Guide to the European Union* (Butterworths, 1996), pp 268-269.

⁵² See for example a very critical approach focusing on state rhetoric to justify the widening of security powers: H. Busch, *Grenzenlose Polizei? Neue Grenzen und Polizeiliche Zusammenarbeit in Europa* (Dampfbboot Verlag, 1995), p 319; M. Anderson and M. den Boer (eds) *Policing Across National Boundaries* (Pinter, 1994) pp 9, 27, 184.

⁵³ Hertweck, 'Hindernisse auf dem Weg nach Europa: Probleme der grenzüberschreitenden justiziellen Zusammenarbeit', (1995) 49(11) *Kriminalistik* 721; Schneider, 'Ein grenzüberschreitendes kooperatives Sicherheitssystem. Oder – Auf der Suche nach einer neuen Qualität der Zusammenarbeit', (1998) 52(5) *Kriminalistik* 306; Storbeck, 'La coopération des polices en Europe', (1995) 13 *Les Cahiers de la Sécurité Intérieure* 175.

⁵⁴ See among many Bowling, 'Transnational Policing: The Globalization Thesis, a Typology and a Research Agenda', (2009) 3(2) *Policing* 149; H. Busch, *Grenzenlose Polizei? Neue Grenzen und Polizeiliche Zusammenarbeit in Europa* (Dampfbboot Verlag, 1995), pp 285-319; In relation to the impact of globalisation on policing see generally Reiner, 'Policing in a Post-Modern Society', (1992) 55(6) *The Modern Law Review* 761 cited in Kempa, Stenning and Wood, 'Policing communal spaces: A reconfiguration of the 'mass private property' hypothesis' (2009) 44 *British Journal of Criminology* 562, 565-566; A. Wakefield and J. Fleming (eds), *The SAGE Dictionary of Policing* (Sage, 2009), pp 70-71 and 124-126.

⁵⁵ See J. Monar, N. Neuwahl, D. O'Keeffe and W. Robinson, *Butterworths Expert Guide to the European Union* (Butterworths, 1996), p 247.

⁵⁶ See Fijnaut, 'International Policing in Europe: Present and Future', (1994) 19(6) *European Law Review* 600, 600-603; Hertweck, 'Hindernisse auf dem Weg nach Europa: Probleme der grenzüberschreitenden justiziellen Zusammenarbeit', (1995) 49(11) *Kriminalistik* 721; Schneider, 'Ein grenzüberschreitendes kooperatives Sicherheitssystem. Oder – Auf der Suche nach einer neuen Qualität der Zusammenarbeit', (1998) 52(5) *Kriminalistik* 306; Storbeck, 'La coopération des polices en Europe', (1995) 13 *Les Cahiers de la Sécurité Intérieure* 175.

of Member States – or cooperation within the European Union.⁵⁷ EU frameworks influencing Member States' cooperation are, for example, instruments regulating mutual assistance in criminal matters and agencies like Europol and Eurojust. A regional initiative that worked its way up to the EU level is the Schengen Convention, which institutionalised collaboration of EU and non-EU Member States at the legal and operational levels. Other existing police cooperation frameworks are bilateral and multilateral, as well as EU initiatives that have been adopted to enhance the previously mentioned cooperation strategies.⁵⁸

Harmonised European legal frameworks regulating police cooperation

Several European legal frameworks facilitating police cooperation amongst the Member States of the EU have been established since the 1950s.⁵⁹ The earliest include the 1957 European Extradition Treaty⁶⁰ and the 1959 European Convention on Mutual Assistance in Criminal Matters adopted by the Council of Europe.⁶¹ The Schengen Convention supplemented this European Convention later on with a view to making it more effective.⁶² The Conventions facilitated the establishment of a number of regional strategies, such as the conclusion of the 1962 Benelux Treaty on Extradition and Mutual Legal Assistance in Criminal Matters⁶³, NebedeagPol⁶⁴ and cooperation in the Meuse-Rhine Euroregion.⁶⁵ While not leading to harmonisation of standards and practices between all Member States, the Conventions led to the creation of advanced and innovative cross-border enforcement in some European regions. The cooperation in the Meuse-Rhine Euroregion will be discussed in more detail below in order to demonstrate the impressive extent to which states have ceded competences in the regional context.

A later harmonised instrument of mutual legal assistance in the EU was the EU Convention on Mutual Assistance in Criminal Matters between the Member States of the EU of 29 May 2000 and the Additional Protocol of October 2001.⁶⁶ This Convention is particularly interesting with regard to police cooperation practice as it introduced in its Article 13 a cooperation provision on Joint Investigation Teams (JITs), which became a much debated, but less frequently practiced strategy that highlights the gap between policy and practice in the EU and the reluctance of practitioners to accept a further level of bureaucracy in cooperation.⁶⁷ The Convention further harmonised the use of covert policing techniques, such as controlled deliveries (Article 12), undercover operatives (Article 14) and the

⁵⁷ See in relation to this distinction Gless, 'Police and Judicial Cooperation between European Union Member States' in C. Fijnaut and J. Ouwerkerk (eds), *The Future of Police and Judicial Cooperation in the European Union* (Martinus Nijhoff Publishers, 2010), pp 27-28.

⁵⁸ *ibid.*

⁵⁹ The term EU will be used more broadly not only describing the present EU, but also all its legal antecedents, although, from a legal perspective, this is less precise.

⁶⁰ See European Convention on Extradition, Paris, 13 December 1957 at <http://conventions.coe.int/treaty/en/Treaties/Html/024.htm>.

⁶¹ European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20 April 1959 at <http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm>.

⁶² See Militello and Mangiaracina, 'The Future of Mutual Assistance Conventions in the European Union', in C. Fijnaut and J. Ouwerkerk, *The Future of Police and Judicial Cooperation in the European Union* (Martinus Nijhoff Publishers, 2010), pp 174-175.

⁶³ See at www.benelux.be; note that the Treaty was amended by the Protocol of 11 May 1974.

⁶⁴ Regional cooperation agreement of 1969 between police from The Netherlands, Belgium and Germany in the area of Maastricht, Aachen and Luik.

⁶⁵ See T. Spapens and C. Fijnaut, *Criminaliteit en rechtshandhaving in de Euregio Maas-Rijn* (Intersentia, 2005), p 8.

⁶⁶ OJ C197 of 12 July 2000.

⁶⁷ See Block, 'EU Joint Investigation Teams: Political Ambitions and Police Practices', in S. Hufnagel, S. Bronitt and C. Harfield (eds) *Cross-Border Law Enforcement Regional Law Enforcement Cooperation - European, Australian and Asia-Pacific Perspectives* (Routledge, 2010) (Forthcoming).

interception of telecommunications (Article 18).⁶⁸ While these Conventions furthered regional cooperation, they cannot generally be attributed a harmonising effect. However, the countries that created closer cooperation with neighbouring states under the Conventions demonstrated a considerable willingness to give up competences to enable cooperation, as the case studies will reveal.

Agencies enhancing police cooperation in the EU

In addition to overarching legal frameworks, several other initiatives have been developed to foster EU police cooperation. In relation to information exchange, the most prominent development was the creation of the Europol agency.⁶⁹ Like the Schengen Convention, the Europol Convention (and since 2010 the Europol Decision) does not only provide a legal framework for certain forms of police cooperation, but also for operational arrangements. The creation of Europol can be seen as a major surrender of national competences to enhance police cooperation and security. Although the mandate and powers of Europol were and still are subject to controversial debates amongst Member States, in particular in relation to possible enforcement powers⁷⁰, the agency is by now an integral part of EU policing. This becomes particularly apparent in more recent developments, such as the expansion of the Europol mandate to initiate investigations and participate in JITs.⁷¹ Europol will therefore be discussed as a case study below.

The Schengen Convention

Already in the times of the European Community and today within the EU context, the Schengen Agreement of 1985⁷² and the following 1990 Convention Implementing the Schengen Agreement of 14 June 1985⁷³ (Schengen Convention) provided a legislative framework for cross-border enforcement between the European states that signed on to them.⁷⁴ France, Germany, Belgium, the Netherlands and Luxemburg were the first EU Member States to abolish their common borders.⁷⁵ For this reason, a focus lies on these participating countries in the comparison.

The Schengen Convention is a broad legal framework that provides considerable scope and latitude for police initiatives. Amongst other measures, it established the Schengen Information System (SIS)⁷⁶ and the possibility of cross-border surveillance (Article 40) and

⁶⁸ See also Article 73 Schengen Convention of 1990.

⁶⁹ Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention) of 26 July 1995, OJ C316 of 27 November 1995, as well as its protocols, now Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA) (OJ L 121/37 of 15 May 2009).

⁷⁰ J. Occhipinti, *The Politics of EU Police Cooperation – Towards a European FBI* (Lynne Rienner Publishers, 2003), pp 42-43; V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), pp 165-166.

⁷¹ See in particular in relation to the expansion of the Europol mandate the 'Danish Protocol' OJ C2 of 6 January 2004, p. 3.

⁷² See Schengen Agreement (1985) at [http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=42000A0922\(01\)&model=guichett&lg=en](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=42000A0922(01)&model=guichett&lg=en).

⁷³ See Convention Implementing the Schengen Agreement (1990) at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922\(02\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):EN:HTML); note that the Convention is only being enforced since 1995.

⁷⁴ C. Joubert and H. Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights* (Kluwer Law International, 1996), p 6.

⁷⁵ These countries signed an Agreement in Schengen on 14 June 1985 on the gradual abolition of checks at their common borders.

⁷⁶ The Schengen Acquis as referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999 at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/l_239/l_23920000922en00010473.pdf at 2.5.

pursuit (Article 41). Title III of the Convention deals with police and security and more particularly its Chapter 1 (Articles 39-47) with police cooperation. In relation to 'hot pursuit', the Convention confers on Member States some flexibility in implementation, which leads to the application of varying degrees of restrictions (Article 41). The impact of the Convention and the measures taken therefore differ from country to country.⁷⁷ This makes apparent that, although many sovereignty concerns have been overcome since the establishment of the EU, states still do not surrender competences easily towards the EU and among each other. Article 41 Para 9 of the Convention, for example, gives signatories the margin of appreciation to limit or extend the pursuit into neighbouring states. The drafters of the Convention introduced these individual limits to safeguard the sovereign rights to criminal jurisdiction of Member States.⁷⁸ Despite the introduction of the Schengen Convention, France opted out of Article 41 in 1995 and only gradually allowed pursuit into its territory for particular offences.⁷⁹ Until recently, Germany, by not having particular restrictions to Article 41, allowed French police officers to engage in 'hot pursuit' onto German territory, though France conversely did not allow similar pursuits by German police officers.⁸⁰ It follows that a harmonised approach under the Convention can only be achieved gradually as states try to preserve their sovereignty in this field.

However, the first five Schengen states have already developed very advanced cooperation strategies that involve considerable ceding of competences under the Schengen Convention, like for example the Meuse-Rhine Euroregion cooperation. In particular in the regional context, states use the Convention to promote police cooperation. This becomes also apparent in other regions, like the Nordic countries, although the Schengen Convention was less influential in the establishment of this cooperation. This Nordic Police cooperation scheme⁸¹ has further been labelled 'best practice' in the EU.⁸² As the Nordic countries had already abolished passport controls at their common borders in 1957 through the Nordic Passport Control Agreement⁸³ and display considerable similarities in culture and language, they will be considered in the final comparative analysis with Australia.

⁷⁷ C. Joubert and H. Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights* (Kluwer Law International, 1996), pp 15-17, 538-542.

⁷⁸ Hertweck, 'Hindernisse auf dem Weg nach Europa: Probleme der grenzüberschreitenden justiziellen Zusammenarbeit', (1995) 49(11) *Kriminalistik* 721, 724.

⁷⁹ Hertweck, 'Hindernisse auf dem Weg nach Europa: Probleme der grenzüberschreitenden justiziellen Zusammenarbeit', (1995) 49(11) *Kriminalistik* 721, 724; Interviews at Common German-French Centre for Police and Customs Cooperation conducted in 2007 and 2009; only since 2005 was a mutual cross-border hot pursuit allowed between both countries.

⁸⁰ Hertweck, 'Hindernisse auf dem Weg nach Europa: Probleme der grenzüberschreitenden justiziellen Zusammenarbeit', (1995) 49(11) *Kriminalistik* 721, 724.

⁸¹ The five Nordic countries – Denmark, Finland, Norway, Iceland and Sweden have established close police cooperation since the 18th century. In 1952 the Nordic Council was created and in 1957 a mutual passport agreement was established resulting in the abolition of systemic control at the internal borders between the Nordic countries. See D. Koenig and K. Das, *International Police Cooperation: A World Perspective* (Lexington Books, 2001), pp 229-244.

⁸² *EU Schengen Catalogue, Volume 4, Police Co-Operation: Recommendations and Best Practices* (Council of the European Union, General Secretariat, June 2003), p. 16.

⁸³ C. Joubert and H. Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights* (Kluwer Law International, 1996), p 31.

Other developments

Further initiatives that were developed with the intention to improve police cooperation in the EU are the Swedish Initiative⁸⁴ and the Treaty of Prüm.⁸⁵ In relation to information exchange, both the Swedish Initiative and the Treaty of Prüm make use of the principle of mutual recognition to enable information exchange between Member States and eliminate boundaries created by the differences in national data protection laws.⁸⁶ The Treaty of Prüm, similarly to the Schengen Convention, promotes the development of advanced initiatives at regional level.⁸⁷ This treaty is, like Schengen, a regional initiative that has been acceded to by an increasing number of Member States and has, at least partly, been adopted at EU level.⁸⁸ The development of these initiatives shows that intergovernmental initiatives continue to grow in the field of police cooperation. Harmonised legal frameworks facilitate regional cooperation and enhance law enforcement across borders. A constant interaction takes place between harmonised and regional initiatives, which ensures continued innovation in the field of EU police cooperation and the further surrendering of competences by Member States.

Australian legal frameworks impacting on police cooperation between states and territories

General

The border controls between Australian states and territories have been abolished since the former Australian colonies became a federation in 1901. As all states and territories have different jurisdictions and criminal laws overlaid by federal jurisdiction, they have been facing the problem of cross-border enforcement and police cooperation for considerably longer than the EU.⁸⁹ The difficulties of cross-border enforcement in Australia today can be observed in particular in relation to calls for new laws to enable cross-border investigation. These reform proposals deal with mutual recognition of law governing controlled operations, assumed identities, electronic devices and witness anonymity.⁹⁰ Although police cooperation has always been very important in the Australian criminal justice system, it has now become increasingly important with regard to the growing threat of terrorism and organised crime, and there have been numerous initiatives to encourage more effective cross-border investigation.⁹¹

Police cooperation under the constitutional framework

In the Australian context, the power to enforce state and territory laws and the autonomy in making these laws stem from the Australian Constitution. The Commonwealth of Australia Constitution Act states in Chapter V, section 108 that

⁸⁴ Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (OJ L 386 of 29 December 2006).

⁸⁵ Council of the European Union, Treaty of Prüm, 10900/05, Brussels, 7 July 2005.

⁸⁶ See for example M. Böse, *Der Grundsatz der Verfügbarkeit von Informationen in der strafrechtlichen Zusammenarbeit der Europäischen Union* (Bonn University Press, 2007), pp 21-49.

⁸⁷ For example, it led to the strengthening of cooperation within the German-French Centre for Police and Customs Cooperation as was stressed in interviews conducted at the Centre in 2007 and 2009.

⁸⁸ See for a comprehensive overview of the Prüm process Bellanova, 'The "Prüm Process": The way forward for police cooperation and data exchange?', in E. Guild and F. Geyer (eds.), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate, 2008), pp 201-221.

⁸⁹ M. Finnane, *Police and Government: Histories of Policing in Australia* (Oxford University Press, 1994), p. 7.

⁹⁰ See the Report of the Leaders Summit on Terrorism and Multijurisdictional Crime, *Cross-Border Investigative Powers for Law Enforcement*, November 2003, i.

⁹¹ *ibid* i-v.

Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

The Australian Constitution thereby creates autonomy in relation to legislative powers for the states, which has similar effects in practice as EU Member States' sovereignty. By cooperating with other states and territories, for example by exchanging information or allowing foreign police on one's territory, state sovereignty⁹² in relation to national jurisdiction and law enforcement is endangered. This constitutional framework led to the need for states and territories to either trade powers on a bilateral and multilateral basis or give up competences to the federal government to enhance cross-border police cooperation. However, there are also federal criminal laws. Nevertheless, the absence of any plenary power to enact federal laws means that federal criminal laws, to be valid, must be related to a head of power. Thus, drug importation may be proscribed under federal law under two heads of power: the trade and commerce power and the external affairs power, respectively ss51(i) and 51 (xxix). The federal parliament can regulate imports and exports (including narcotics) under trade and commerce, but also under the external affairs powers because of the myriad of international treaties, which Australia has signed to suppress drug trafficking.⁹³

The Australian Federal Police

The creation of the Australian Federal Police (AFP) in 1979 has enhanced cross-border law enforcement, but has not furthered cross-jurisdictional cooperation between Australian states and territories. The constitutional limits to the powers of the AFP and the unwillingness of states and territories to transfer more powers to the AFP limit its potential benefits to police cooperation. Similar to the competences of Europol, the powers of the AFP are limited to certain subject areas (see Section 8 of *Australian Federal Police Act 1979* (Cth)).⁹⁴ Federal criminal laws, which trigger AFP competence, can also be enforced by state and territory police. This adds a certain level of difficulty to cooperation and indicates a struggle for competences, but can also facilitate cooperation. As the AFP is responsible for federal offences in all states and territories and is therefore not limited by borders, the different jurisdictions can commission the AFP to carry out cross-border tasks, like for example VIP protection.⁹⁵ Vice versa, state and territory police can be commissioned to act in investigations falling under AFP competence.⁹⁶ This indicates that the existence of different jurisdictions with multiple competences can be beneficial to cross-border policing in Australia.

The AFP can also be a helpful asset to JITs as AFP practitioners usually have a broad knowledge of the legal requirements in a multitude of different jurisdictions.⁹⁷ However, the employment of the AFP in cross-jurisdictional teams also presents challenges.

⁹² Only Australian states have sovereignty under Chapter V, Section 108 of the Constitution while the two territories (Northern Territory and Australian Capital Territory) are more dependent on the federal state. However, the territories are also separate jurisdictions as they generate their own legislation, for example in the fields of criminal law and criminal procedure.

⁹³ S. Bronitt and B. McSherry, *Principles of Criminal Law* (Thomson Reuters, 2010), pp 810-824.

⁹⁴ Note that the AFP unlike Europol has enforcement powers.

⁹⁵ Information derived from interview with former AFP officer employed in the field of VIP protection.

⁹⁶ See *Australian Federal Police Act 1979* (Cth), in particular Part I s 4AA and 6-12A.

⁹⁷ Interviews conducted with AFP and Victoria Police officers: As AFP officers operate frequently cross-jurisdictionally they get to know a variety of jurisdictions and work and get acquainted with different legal requirements in many jurisdictions.

According to interviews with officers from Australian police forces, state and territory police protect the sovereignty of their jurisdictions towards the AFP, which can hamper cooperation, for example in the area of information exchange.⁹⁸ AFP officers are also usually recruited from a higher educational level and often do not have as much experience in 'street level' police work as state and territory police, which can lead to a lower degree of acceptance by state and territory colleagues.⁹⁹ These attitudes, however, are personal rather than concerning entire organisations.¹⁰⁰ Particularly in the context of JITs, interviewees stressed that the AFP officers effectively facilitate cooperation and support and/or lead the investigations with often broad knowledge of a multitude of systems. This is an advantage compared to the European model. Europol, while being able to participate in JITs, cannot do so as actively as the AFP as it lacks cross-jurisdictional enforcement powers.¹⁰¹

The competences of AFP officers are, however, limited. AFP officers are competent in relation to law enforcement with a cross-border aspect (outside of Australia), federal offences and state offences with a federal aspect.¹⁰² The struggle for asserting competence over particular issues even becomes apparent in the wording of Part I s4AA of the Australian Federal Police Act 1979 (Cth): "(...) (1) For the purposes of this Act, a State offence has a federal aspect if, *and only if*: (...)" (emphasis added). The use of this wording by the drafters of the Act implies an existing fear of the overlapping of state and federal competences. It can be concluded that protection of state sovereignty in the Australian context can be observed at both the practitioner and state levels. While this rather reflects personal attitudes at the practitioner level, it is more objectively reflected in legislation and the reluctance to give up competences to the AFP at the state level.

Cross-border incursions

In the area of cross-border incursions, states have implemented uniform 'special constables' provisions into their legislation to facilitate cross-border enforcement.¹⁰³ Due to the territorial sovereignty of states and territories, an Australian police officer can cross a border into another state, but stops being a police officer the moment he enters another jurisdiction. If he is caught exceeding the speed limit for example, he is liable for a traffic infringement.¹⁰⁴ As the 'hot pursuit' of criminals across state and territory borders and other cross-border incursions would otherwise have been impossible, all Australian jurisdictions introduced the legal construct of the 'special constables' into state, territory and Commonwealth law.¹⁰⁵ A 'special constable' is sworn into more than one jurisdiction

⁹⁸ Interviews with AFP, Victoria, and former officers from the New South Wales Police were conducted between July 2007 and May 2010 for the underlying PhD research.

⁹⁹ Interviews with this result were conducted with officers from the Victoria Police, but AFP officers confirmed these observations.

¹⁰⁰ AFP, Victoria Police, and former New South Wales practitioners were interviewed on the topic of cooperation with the AFP and all highlighted this difficulty.

¹⁰¹ See in relation to the employment of Europol as head of Joint Investigation Teams: de Lima, 'Europol as the Director and Coordinator of the Joint Investigation Teams', (2006) 9 *The Cambridge Yearbook of European Legal Studies* 313.

¹⁰² See *Australian Federal Police Act 1979* (Cth), in particular Part I s 4AA and 6-12A.

¹⁰³ See Part IV *Australian Federal Police Act 1979* (Cth); Part 9 *Police Act 1998* (SA); Part IV *Police (Special Provisions) Act 1901* (NSW); Part II *Police Administration Act 2007* (NT); Part V *Police Service Administration Act 1990* (Qld); Part II *Police Service Act 2003* (Tas); Part VC *Police Regulations Act 1958* (Vic); Part III *Police Act 1892* (WA).

¹⁰⁴ See in relation to controlled deliveries, where the problem becomes even more prominent, Report of the Leaders Summit on Terrorism and Multijurisdictional Crime, *Cross-Border Investigative Powers for Law Enforcement*, November 2003, 1-5.

¹⁰⁵ Part IV *Australian Federal Police Act 1979* (Cth); Part 9 *Police Act 1998* (SA); Part IV *Police (Special Provisions) Act 1901* (NSW); Part II *Police Administration Act 2007* (NT); Part V *Police Service Administration Act 1990* (Qld); Part II *Police Service Act 2003* (Tas); Part VC *Police Regulations Act 1958* (Vic); Part III *Police Act 1892* (WA).

and therefore does not leave his/her powers at the border.¹⁰⁶ The 'special constable' provisions are one of the few initiatives to facilitate police cooperation that have been implemented uniformly.

Information exchange

Another more major development - as it brought with it a previously unexperienced amount of harmonisation - was the creation of the CrimTrac agency. CrimTrac is the first Australian common police database that brings together a growing number of different types of information (fingerprints, DNA, etc.) with a view to enable its exchange between the different police forces.¹⁰⁷ CrimTrac was only operational one year after Europol, in 2000. Despite Australia being a federation since 1901, state and territory police could not centrally access certain information up to that date. As CrimTrac has developed innovative strategies to ensure intergovernmental agreement on its initiatives, it will be addressed as a case study below.

Model laws

Model legislation has been introduced in Australia to promote national consistency in the area of criminal procedure. However, the existence of model legislation in this field does not prevent individual jurisdictions from making adjustments appropriate to their particular circumstances and therefore does not ensure a high level of uniform implementation and harmonisation.¹⁰⁸ Due to the sovereignty of states and territories in the field of criminal procedure, they are granted a margin of appreciation in the implementation process, similar to EU Member States in relation to the Schengen Convention. More recently, the principle of mutual recognition has been promoted through model laws in the field of controlled operations, assumed identities, electronic devices and witness anonymity on the basis of the 2003 Cross-Border Investigative Powers Report. The concept of introducing mutual recognition through model laws has already been adopted in relation to forensic procedures¹⁰⁹ and the recognition of search warrants.¹¹⁰ The model laws promoted by the 2003 Report would be more advanced than the forensic procedures and search warrant initiatives. Under the new laws, a police agency could obtain warrants from the courts in its own jurisdiction that would apply in another jurisdiction.¹¹¹ If implemented, this initiative would represent the so far most considerable surrender of competences by Australian states and territories in relation to model laws. However, the implementation process is by now taking seven years and is still not completed.

¹⁰⁶ Note that a special constable can also be a part-time civilian officer or 'weekend' police.

¹⁰⁷ See www.crimtrac.gov.au.

¹⁰⁸ *ibid*v.

¹⁰⁹ *Crimes Act 1958* (Vic), ss. 464ZGG-464ZGO; *Crimes Act 1914* (Cth), Part 1D; *Crimes (Forensic Procedures) Act 2000* (NSW); *Forensic Procedures Act 2000* (Tas); *Criminal Investigation (Identifying People) Act 2002* (WA); *Crimes (Forensic Procedures) Act 2000* (ACT); *Police Powers and Responsibilities Act (Forensic Procedures) Amendment Act 2003* (Qld) Part 9 (ss318N-318ZQ).

¹¹⁰ *Crimes Act 1958* (Vic), Part IIA (ss. 340-345); *Search Warrants Act 1985* (NSW), Part 4 (s 24A); *Criminal Investigation (Extraterritorial Offences) Act 1984* (SA); *Crimes Act 1900* (ACT), Part XA (ss 358A - 358E); *Criminal Investigation (Extraterritorial Offences) Act 1985* (NT); *Criminal Investigation (Extraterritorial Offences) Act 1987* (Tas); *Criminal Investigation (Extraterritorial Offences) Act 1987* (WA).

¹¹¹ See the Report of the Leaders Summit on Terrorism and Multijurisdictional Crime *Cross-Border Investigative Powers for Law Enforcement*, November 2003, v-vi.

Regional cooperation agreements in Australia

Unlike in the EU, harmonised legal frameworks facilitating cross-border police cooperation do not exist in Australia.¹¹² Few bilateral and multilateral formal agreements between Australian states and territories regulating cooperation regionally have been created, which represents a major difference to the EU.¹¹³ Most operations across state and territory borders, if regulated at all, occur upon *ad hoc* Memoranda of Understanding (MOUs).¹¹⁴ While practitioners by now call for harmonised legal frameworks facilitating cooperation at the regional and federal levels, Australian states and territories rarely enter into formal cooperation agreements.¹¹⁵ It follows that little advanced cooperation initiatives have developed in Australia leading to a considerable surrender of sovereign powers compared to the EU. It could follow that state and territory sovereignty is even more strongly protected amongst Australian states and territories than amongst EU Member States. However, being a federal system, several federal agencies, like the AFP, have developed that are competent across all jurisdictions and therefore take over cooperation tasks that would in the EU be carried out through bilateral and multilateral Member States cooperation.

Regional cooperation strategies: case studies

Both systems have developed regional cooperation strategies that lead to a considerable ceding of competences by EU Member States and Australian states and territories respectively. The regional cooperation strategies assessed here are the Meuse-Rhine Euroregion cooperation in the EU and the NPY lands cooperation in the Australian context. By examining these regional initiatives in greater depth, common principles can be identified, which could help to promote further harmonisation in both systems.

Meuse-Rhine Euroregion cooperation

In the German, Dutch, Belgium border region, also called 'Meuse-Rhine Euroregion', drug import, tourism and major cities on the German side of the border create problems related to frequent border crossing.¹¹⁶ A particular problem in this region results from the tolerant approach to soft drugs in the Netherlands, which is based on the regulation of the supply of cannabis through 'coffee shops'.¹¹⁷ The specific regional demographics and the different drug policies in these neighbouring countries have led to the development of an extensive amount of specialised police cooperation initiatives dealing with these issues.¹¹⁸

¹¹² S. Bronitt and B. McSherry, *Principles of Criminal Law* (Thomson Reuters, 2010), Ch 15.

¹¹³ An exception is the NPY lands cooperation, see Fleming, 'Policing Indigenous People in the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Lands', in Hufnagel, S., Bronitt, S. and Harfield, C. (eds), *Cross-Border Law Enforcement Regional Law Enforcement Cooperation - European, Australian and Asia-Pacific Perspectives* (Routledge, 2010) (Forthcoming).

¹¹⁴ See below Europol and CrimTrac case studies.

¹¹⁵ See for example MOU: 0203-2009 between the Department of Child Protection Western Australia and Western Australia Police in relation to The Family and Domestic Violence Co-location Model at www.childprotection.wa.gov.au.

¹¹⁶ Interviews conducted with Australian police practitioners from the AFP, VicPol and CrimTrac.

¹¹⁷ See T. Spapens and C. Fijnaut, *Criminaliteit en rechtshandhaving in de Euregio Maas-Rijn* (Intersentia, 2005), p 8.

¹¹⁸ Korf, 'Dutch Coffee Shops and Trends in Cannabis Use', (2002) 27 *Addictive Behaviour* 851, 852.

¹¹⁹ Spapens, 'Policing a European Border Region: The Case of the Meuse-Rhine Euroregion', in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate, 2008), p 225.

The creation of the Meuse-Rhine Euroregion cooperation was supported by a number of European Conventions, but also regional cooperation arrangements.¹¹⁹ Cross-border cooperation strategies for this region are laid out in the Benelux Cooperation Treaties¹²⁰, which were expanded by the Treaty of Senningen,¹²¹ the Treaty of Enschede,¹²² and the Treaty of Prüm,¹²³ as well as several other bilateral and multilateral agreements. According to these legal frameworks, police in the Meuse-Rhine Euroregion are allowed to cross the borders in 'hot pursuit',¹²⁴ to carry weapons, and to make use of their weapons when crossing into another jurisdiction.¹²⁵ Furthermore, they are allowed to exercise certain powers on foreign territory, for example in case of emergency, and can even exchange physical evidence directly.¹²⁶ Information exchange between these states takes place directly between the criminal investigation departments in charge.¹²⁷ The borders and main transport routes are patrolled by Joint Hit Teams (JHTs) consisting of law enforcement personnel from both sides of the border.¹²⁸ Several institutions facilitating police cooperation in this border region have been created, such as EMMI (Euregional Multimedia Information Exchange) and EPICC (*Euregionales Polizei-Informations-Cooperations-Centrum*).

To enable this very advanced cooperation, the participating Member States have had to surrender considerable competences. This has been facilitated in a regional context as only a limited number of Member States have been involved that have had a history of close cooperation since the 1960s.¹²⁹ The Meuse-Rhine Euroregion cooperation is also exclusively beneficial to a specific region, rather than along an entire common border, which further limits the surrender of sovereignty. Strategies in the case of the Treaty of Enschede, for example, only apply at certain parts of the border, rather than uniformly.¹³⁰ This indicates in turn the prevailing sovereignty concerns between the participating Member States.

However, regional cooperation initiatives such as the Meuse-Rhine Euroregion are an integral part of the advancement of European police cooperation. They are on the one hand the result of EU legal harmonisation, but can on the other hand promote further harmonised legal frameworks. The Meuse-Rhine Euroregion cooperation was partly

¹¹⁹ For example the 1957 European Extradition Treaty and the 1959 European Convention on Mutual Assistance in Criminal Matters, but also the regional police working group between The Netherlands, Belgium and Germany, called 'NebedeagPol'.

¹²⁰ See in particular the Benelux Treaty on Extradition and Mutual Legal Assistance in Criminal Matters was signed in Brussels, 27 June 1962 and entered into force on 11 December 1967 (available at <http://www.benelux.be/>).

¹²¹ *Verdrag tussen het Koninkrijk België, het Koninkrijk der Nederlanden en het Groothertogdom Luxemburg inzake grensoverschrijdend politieel optreden*, 8 June 2004.

¹²² *Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland inzake de grensoverschrijdende politieke samenwerking en de samenwerking in strafrechtelijke aangelegenheden*, March 2005.

¹²³ *Prüm Convention* (2005) Brussels, 7 July 2005, Doc 10900/05 see at <http://register.consilium.europa.eu/pdf/en/05/st10/st10900.en05.pdf>.

¹²⁴ Before those treaties were concluded, police crossing borders in hot pursuit had to stop within a certain radius from the border, between The Netherlands and Germany 10 km.

¹²⁵ Interview with cooperation coordinator of the Dutch Police, Dutch-German border region, Venlo The Netherlands, 2008.

¹²⁶ *ibid.*

¹²⁷ Spapens, 'Policing a European Border Region: The Case of the Meuse-Rhine Euroregion', in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate, 2008), p 229.

¹²⁸ *ibid* 226-229.

¹²⁹ One of the underlying initiatives, the NebedeagPol working group had been established in 1969 and the Benelux Treaty on Extradition and Mutual Legal Assistance in 1967.

¹³⁰ *Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland inzake de grensoverschrijdende politieke samenwerking en de samenwerking in strafrechtelijke aangelegenheden*, March 2005.

established under preceding harmonised and regional European initiatives, like the 1962 Benelux Treaty, the 1959 Convention on Mutual Legal Assistance including its 1978 and 2001 Protocols and NebedeagPol. It was also influenced by more comprehensive legal frameworks, such as the Schengen Convention and the 2000 Mutual Assistance Convention,¹³¹ which were of crucial importance to develop sophisticated strategies in this region.¹³² Advanced regional cooperation initiatives that have inspired the Euroregion cooperation, such as the cooperation under the Benelux Treaties and NebedeagPol, have been incorporated into the Schengen Convention.¹³³ It follows that regional cooperation (Benelux, NebedeagPol) has inspired harmonised cooperation frameworks (Schengen Convention), which in turn facilitated the creation of further regional cooperation, such as the later bilateral and multilateral agreements in the Meuse-Rhine Euroregion. Therefore, there is a constant dynamic interaction between regional and harmonised frameworks enhancing police cooperation in the EU. This interaction leads to the surrender of competences by member states at least at the regional level. Following this reasoning, the Euroregion cooperation, despite being limited to a specific border region, could nevertheless inspire future harmonised legal frameworks, thereby enhancing EU police cooperation more generally. The Euroregion case study, therefore, emphasises the value and importance of harmonised legal frameworks and regional cooperation alike, as the incentive for states to surrender sovereign powers.

Australian NPY lands cooperation

A similar case study to the Meuse-Rhine Euroregion has been chosen in the Australian context. Like the EU example, the NPY lands cooperation was created in response to a particular need in a border region, which led to the development of an advanced cooperation initiative. In the Australian scenario, aboriginal people movement across borders and the long distances between aboriginal settlements are the major challenge for police forces in the South Australian (SA), Western Australian (WA) and Northern Territory (NT) border regions.¹³⁴ Problems in this region, the Ngaanyatjarra Pitjantjatjara Yankuntjatjara (NPY) lands, relate to domestic violence, child abuse, sexual abuse, substance abuse, and other forms of offending behaviour.¹³⁵ The cooperation measures created for this region are probably the most advanced of all Australian border regions, although they still need to be tested in practice. The NT Cross-Border Justice Act 2009, the WA Cross-Border Justice Act 2008 and the SA Cross-Border Justice Act 2009 allow police to exercise their powers (within certain limits) in each of the three jurisdictions under recognition of the laws of their state/territory. In other Australian border regions, a police officer must be sworn into the other system to exercise his or her power in the other jurisdiction (typically they are assigned the powers of a 'special constable' as in Police (Special Provisions) Act 1901 NSW). The Cross-Border Justice Acts have further established the principle of mutual recognition in relation to evidence. This demonstrates the considerable extent to which states traded sovereign powers to enable this cooperation. It is further remarkable how quickly legislation evolved between these three states, from the start of the initiative in 2003 to implemented Acts in all three jurisdictions in 2009. The NPY lands cooperation is so far the only formalised Australian regional police cooperation initiative that goes beyond minimum federal requirements. In the NPY lands scenario the considerable giving up of sovereign power between the states and the territory was

¹³¹ See T. Spapens and C. Fijnaut, *Criminaliteit en rechtshandhaving in de Euregion Maas-Rijn* (Intersentia, 2005), p 26.

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ Standing Committee on Legal and Constitutional Affairs on *Law and Justice (Cross-border and Other Amendments) Bill 2009* (May 2009), Chapter 2, see at http://www.aph.gov.au/senate/committee/legcon_ctte/cross_border/report/report.pdf.

¹³⁵ *ibid.*

triggered by an overwhelming need to counter major problems in the region. However, this model could also help improve police cooperation between all states and territories. The Australian Attorney-General's Department has already pointed out that the NPY Lands cooperation scheme could be used to improve the federal Service and Execution of Process Act 1992 (Cth) (SEPA) with a view to further harmonisation.¹³⁶

Similar to the regional EU case study, this example shows that sovereignty concerns can be overcome between bordering states and territories with particular cross-border crime problems. However, the previously discussed reluctance to implement 'model laws' uniformly in all states and territories is an indicator that the surrender of sovereign powers is problematic in relation to the Australian federal state. According to the case study, it seems more likely that competences are given up in a regional context rather than uniformly. It could even be concluded that sovereignty concerns between Australian states and territories are greater than between EU Member States as the NPY lands cooperation is so far the only formal regional initiative promoting such a considerable ceding of competences. Even at the regional level, Australian states and territories seem reluctant to surrender sovereignty by entering into formal cooperation agreements. Harmonisation resulting from an interaction of regional and harmonised legal frameworks does not exist in Australia either. However, due to the existence of federal police agencies, the need for direct state and territory cooperation is considerably lower than in the EU and the lack of regional cooperation does not necessarily only relate to sovereignty concerns.

In both case studies the particular problems in the border regions were the incentive to create advanced regional cooperation strategies. An enabling factor in both systems seemed to be the small number of states participating in the initiatives, which facilitates the reaching of a common agreement. Unlike in the federal 'model law' or European Europol context, there was no 'top down' pressure exercised upon the states. The states acted according to their own 'will' rather than in response to a federal or EU initiative. In the regional context states are more empowered and retain more influence over the initiative, which seems to be an important factor in both entities. This emphasises the advantages of intergovernmentalism and regionalism rather than 'top down' federalism in the area of police cooperation.

Harmonised cooperation strategies: case studies

Europol

Europol was legally established in its current form in 1999 under the Europol Convention (signed by the EU Member States on 26 July 1995, before coming into effect on 1 July 1999).¹³⁷ According to Articles 2 and 3 of the Europol Convention, the institution of Europol shall facilitate fast access to information amongst EU Member States on persons suspected to have committed a criminal offence within the territory of Europol competence or who have committed or are suspected to commit such criminal offences in the future.¹³⁸ Europol handles criminal intelligence and, while it lacks law enforcement powers, its mandate was expanded in 2003 to the initiation of criminal investigations and

¹³⁶ See Attorney-General's Department Supplementary Submission to the Standing Committee on Legal and Constitutional Affairs: *Inquiry into Harmonising Legal Systems relating to Trade and Commerce*, Committee Responses to the further questions received from the Secretariat on 22 March 2006 and questions and notice taken at the public hearing on 21 March 2006, p. 11.

¹³⁷ Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention) of 26 July 1995 OJ C316 of 27 November 1995 as well as its protocols, now Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA) (OJ L 121/37 of 15 May 2009).

¹³⁸ M. Böse, *Der Grundsatz der Verfügbarkeit von Informationen in der strafrechtlichen Zusammenarbeit der Europäischen Union* (Bonn University Press, 2007), p 34.

the participation in JITs.¹³⁹ An important, but certainly not exclusive, driving force in its establishment was the then German Chancellor Helmut Kohl.¹⁴⁰ At the time of its establishment, there was no pressing practical need for the institution, which explains why practitioners have often criticised Europol for being superfluous and why it is still partly hampered by the reluctance of Member States to engage in information sharing.¹⁴¹ As Europol was not mainly established by practitioners or designed to cater for their practical needs in relation to police cooperation, it experienced for a long time after its establishment a lower level of acceptance than Interpol.¹⁴² When Europol started operating, there were already many systems of information sharing in place and practitioners considered it more a bureaucratic burden than a benefit to information-sharing.¹⁴³

While these problems of practitioner acceptance in the early phase of Europol predominantly apply to the working of the Europol database, no obvious problems were experienced in relation to the network of Europol liaison officers. As the exchange of sensitive information requires a high level of trust, not only amongst the Member States, but also amongst the individual officers on the ground, Europol does not only consist of a common database, but also a liaison officer network.¹⁴⁴ The liaison officers of all Member States and even non-EU Member States are based in one building to encourage the establishment of close working relationships. They are also not directly supervised by Europol, which gives them a greater freedom to cooperate informally.¹⁴⁵ Practitioners have accepted this network immediately and appreciate the opportunity to know their counterparts from other Member States personally as it enhances trust.¹⁴⁶ Also, the possibility to cooperate formally as well as informally within this network was stated to be an advantage.¹⁴⁷

The information exchange through liaison officers is perceived as being successful, while the establishment of a further database was initially perceived as a bureaucratic burden. This leads to two conclusions in relation to the EU law-making and policy process. Firstly, practitioners need to be involved in the law-making process as this will ensure their acceptance of a common initiative from the start. Secondly, practices that involve close working relationships between police officers of the different Member States enable the creation of trust and closer police cooperation. In this particular example, the problem was not only the establishment or the reaching of a common agreement of the Member States towards the initiative¹⁴⁸, but also the creation of actual practice under it, which required acceptance of the initiative by practitioners. The importance of the practitioners in the harmonisation process of police cooperation strategies can therefore be concluded from the Europol case study.

¹³⁹ J. Occhipinti, *The Politics of EU Police Cooperation – Towards a European FBI* (Lynne Rienner Publishers, 2003), p 61; V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), pp 165-166; See in particular in relation to the expansion of the Europol mandate the 'Danish Protocol' OJ C2 of 6 January 2004, p. 3.

¹⁴⁰ Woodward, 'Establishing Europol: The Story of Europol from its Origins to Present', (1993) 1(4) *European Journal on Criminal Policy and Research* 7.

¹⁴¹ J. Sheptycki, *In Search of Transnational Policing: Towards a Sociology of Global Policing* (Ashgate, 2002), p 43; V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), p 187.

¹⁴² M. Anderson, M. den Boer, P. Cullen, W. Gilmore, C. Raab and N. Walker, *Policing the European Union. Theory Law and Practice* (Clarendon Press, 1995), p 77.

¹⁴³ Wilzing and Mangelaars, 'Where does Politics Meet Practice in Establishing Europol?', (1993) 1(4) *European Journal on Criminal Policy and Research* 71, 77-79.

¹⁴⁴ V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), p 165.

¹⁴⁵ *ibid* 165-166.

¹⁴⁶ Interviews conducted with Europol official and liaison officer in 2007.

¹⁴⁷ *ibid*.

¹⁴⁸ As outlined above in this article, state resistance to the establishment of Europol and in particular the debate about enforcement powers was also a prominent issue between Member States; See V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), pp 165-166 and J. Occhipinti, *The Politics of EU Police Cooperation – Towards a European FBI* (Lynne Rienner Publishers, 2003), pp 29-46 and 51-75.

CrimTrac

A broadly similar initiative to Europol is CrimTrac,¹⁴⁹ the Australian common police database that was established in 2000.¹⁵⁰ A prominent case revealing the problems CrimTrac confronted in its establishment is the Falconio case.¹⁵¹ In this case, a backpacking couple had been attacked by a man in the Northern Territory and one of the backpackers, Peter Falconio, was killed in 2001.¹⁵² The investigation in what first appeared to be an abduction and later turned out to be a murder case was led by the NT, WA and SA police forces, but also involved assistance by other Australian law enforcement agencies like New South Wales (NSW) and Queensland police.¹⁵³ The offender was arrested in 2003 by the SA police and was extradited to the NT for trial.¹⁵⁴ The main problem of the Falconio case was the exchange of data related to DNA recognition. Bloodstains were found on the t-shirt of the female backpacker, Joanne Lees, and as they were not of the male murder-victim, a strong possibility was given that it could identify the offender.¹⁵⁵ A suspect in the case was living in NSW and his DNA sample was requested by the NT police.¹⁵⁶ NSW law at the time, however, did not allow the transfer of information regarding DNA into jurisdictions with obviously different laws.¹⁵⁷ NSW legislation, therefore, needed to be adapted to make the information exchange possible, like for example the Crimes (Forensic Procedures) Act 2000 (NSW). After extensive political pressure was exercised upon the NSW government, NSW and NT concluded an agreement on DNA exchange, regulating information exchange over CrimTrac (based on the principle of mutual recognition).¹⁵⁸

However, information exchange through CrimTrac is by now an Australian success story. Unlike the problems that still existed at the time of the Falconio case, since 2009 full matching occurs also in relation to DNA between all Australian states and territories.¹⁵⁹ CrimTrac is therefore an example of gradual giving up of sovereignty in the name of harmonisation. Australian practitioners interviewed in relation to CrimTrac were all enthusiastic about the initiative. The acceptance gap that could be observed in the early days of Europol was not an issue in the establishment of CrimTrac.¹⁶⁰

A potential explanation for the greater practitioner acceptance could be that, while Europol was a political initiative mainly involving Heads of State, CrimTrac was established under cooperation of practitioners and initiated by practitioners as well as under cooperation of representatives from all states and territories and the AFP.¹⁶¹ There was also a pressing practical need in Australia to establish a common database after 100 years of relying on separate databases and incomplete national systems. However, the state

¹⁴⁹ In relation to the type of information exchanged, CrimTrac would be more comparable to the Schengen Information System, however, with regards to the political issues involved, it is closer to Europol.

¹⁵⁰ See www.crimtrac.gov.au.

¹⁵¹ Gans, 'The Peter Falconio Investigation: Needles, Hay and DNA', (2007) 18 *Current Issues in Criminal Justice* 415.

¹⁵² *ibid.*

¹⁵³ See ABC Report at <http://www.abc.net.au/a/stories/s697700.htm>, retrieved 6 June 2010.

¹⁵⁴ *ibid.*

¹⁵⁵ Gans, 'The Peter Falconio Investigation: Needles, Hay and DNA', (2007) 18 *Current Issues in Criminal Justice* 415, 424.

¹⁵⁶ *ibid.* 425.

¹⁵⁷ *On Trac*, 2009, Vol 2, Issue 1, p 11.

¹⁵⁸ Gans, 'The Peter Falconio Investigation: Needles, Hay and DNA', (2007) 18 *Current Issues in Criminal Justice* 415, 424-426.

¹⁵⁹ *On Trac*, 2009, Vol 2, Issue 1, p 11.

¹⁶⁰ 10 practitioners from the AFP, CrimTrac, Victoria Police and former officers of the New South Wales Police were interviewed in relation to the initiative between 2007 and 2010.

¹⁶¹ See *Memorandum of Understanding between New South Wales Police, Victoria Police, Queensland Police, Western Australia Police, South Australia Police, Northern Territory Police, Tasmania Police, ACT Policing, Australian Federal Police and The CrimTrac Agency, 2006* establishing the board of members consisting of all state and territory as well as Commonwealth heads of agencies as well as special officers.

reluctance to adapt legislation to facilitate information exchange through CrimTrac made the establishment of a common system very difficult.¹⁶² While the problems of DNA exchange have by now been overcome, the introduction of another initiative, the Automated Number Plate Recognition System, presents new challenges to CrimTrac.¹⁶³ According to an interview with the CrimTrac CEO in 2009, these challenges are again situated in the field of data protection and privacy rights, but also relate to financial concerns of the states and territories.¹⁶⁴ Two strategies have been developed as a response to convince the police ministers who form the board of management of CrimTrac to uniformly introduce the initiative.¹⁶⁵ Firstly, after the production of an extensive scoping study, trial runs were successfully initiated between two Australian states to assess the practicability of the initiative.¹⁶⁶ Secondly, these trial runs were filmed; a promotion movie was produced from this material. This movie was subsequently distributed among Australian law-enforcement agencies and at the state and territory government level to generate interest and acceptance. This will hopefully convince the decision-makers concerned to uniformly introduce this new initiative.

A further strategy used by CrimTrac to generate interest and ensure practitioner and state acceptance are regular meetings with all actors involved in information-sharing. This includes primarily the board of management (police ministers of all jurisdictions), but also other actors.¹⁶⁷ Further, CrimTrac has never been perceived as a federal initiative due to its structure, which involves all state and territory police equally.¹⁶⁸ According to statements by practitioners, this has ensured a high level of trust in the initiative and prevented the fear of being overrun by harmonised structures threatening state sovereignty.¹⁶⁹ To this extent, CrimTrac can be seen as a model to overcome practitioner and state and territory sovereignty concerns. Due to the intergovernmental decision-making structure, states are fully recognised and given ownership over the initiative. Despite being a federal 'top down' initiative, the sensitive approach to intergovernmental decision-making of CrimTrac has ensured acceptance by both, practitioners and state actors.

It can be concluded that to develop a successful harmonised institution, practitioners and states need to be equally involved to ensure state support and practice under the initiative. Acceptance by states and practitioners cannot be replaced by the creation of common laws and institutions. The efforts to make these frameworks work need to go further. Particular strategies, such as those employed in the context of CrimTrac, can convince state actors and practitioners of the value of an initiative. This facilitates the establishment of common state agreement on and common practice under a new initiative. Such strategies to generate acceptance could also be applied in the EU context, for example in relation to the widening of the mandate and powers of Europol. However, the downside of these processes, as DNA exchange has shown in the example of CrimTrac, is that they take a long time, in the DNA example nearly ten years. It is also unlikely that strategies of persuasion of state actors can change long established political attitudes

¹⁶² See for more information www.crimtrac.gov.au and in particular the yearly reports depicting the reluctance of states and territories to overcome data protection provisions until December 2009.

¹⁶³ See CrimTrac Project Report on Automated Number Plate Recognition System 2009 and CrimTrac ANPR Scoping Study Report 2008978-0-9805644-0-2; See also www.crimtrac.gov.au/systems_projects/AutomatedNumberPlateRecognitionANPR.html.

¹⁶⁴ Interview with CrimTrac CEO conducted for PhD research in 2009, Canberra, Australia.

¹⁶⁵ *ibid.*

¹⁶⁶ See CrimTrac Project Report on Automated Number Plate Recognition System 2009 and CrimTrac ANPR Scoping Study Report 2008978-0-9805644-0-2; See also www.crimtrac.gov.au/systems_projects/AutomatedNumberPlateRecognitionANPR.html and Interview with CrimTrac CEO conducted for PhD research in 2009, Canberra, Australia.

¹⁶⁷ See at www.crimtrac.gov.au/about_us/BoardofManagement.html.

¹⁶⁸ *ibid.*

¹⁶⁹ 10 practitioners from the AFP, CrimTrac, Victoria Police and former officers of the New South Wales Police were interviewed in relation to the initiative between 2007 and 2010.

against a strategy or the widening of competences. However, they might speed up processes in cases where agreement is more easily reached.

Harmonisation efforts in Australia and in the EU – Conclusions

The following assessment of the previously presented cooperation strategies in Australia and in the EU is based on the presumption that the harmonisation of laws impacting on police cooperation should encounter fewer difficulties in Australia than in the EU. As Australia is a federation consisting of similar police organisations with a common working language, culture and structure, problems relating to sovereignty and differences between state systems should be less apparent than in the EU. Similarities between the two systems should therefore not exist to the extent outlined above. The in-group projection model might nevertheless explain similarities, as well as differences, in instances where cooperation is inhibited to an even greater extent in Australia than in the EU.

This article has provided a small insight into the challenges to harmonisation in both systems. Common impediments were identified as practitioner reluctance to accept harmonised strategies and state reluctance to reach common agreement on harmonised strategies and to surrender sovereignty. In comparison, regional bilateral and multilateral initiatives were established that led to a far-reaching ceding of competences amongst EU Member States and amongst Australian states and territories respectively. However, a prominent difference between Australia and the EU is that such regional cooperation frameworks have developed frequently in the EU since the 1960s, whereas the only comparable cooperation framework in Australia is the 2009 NPY lands cooperation. This is partly due to the structure of the federal system and the existence of federal agencies like the AFP that have cross-border enforcement powers, facilitating cooperation and making formalised regional cooperation less necessary. However, it could also be explained by a greater reluctance of Australian states and territories to cooperate, compared to EU Member States.

In the EU as well as in Australia, states have the freedom to adopt or retain measures or legislation that provide higher standards than the minimum requirements set by harmonised rules.¹⁷⁰ It follows that the implementation of common legal frameworks is rarely uniform in both systems. This was observed in the EU in relation to the Schengen Convention and with regard to 'model laws' in the field of criminal procedural law in Australia. While harmonisation, even to the degree of uniformity, has been achieved in Australia through 'model laws' in the field of forensic procedures and search warrants, the process of implementation has not been successful in other fields.¹⁷¹ Although it could have been assumed that uniform implementation occurs to a greater extent in a federation of states, this conclusion could not be drawn from the above research.

In the example of Europol, it was observed that practitioners adapt positively to harmonised 'top down' strategies, even though they consider them initially to be a bureaucratic burden. However, states display greater reluctance to accept harmonised initiatives. This was particularly apparent in relation to the legal reform required to implement CrimTrac and model criminal investigation laws in Australia. Also, the widening of the competences of Europol has been a constant debate amongst Member States, and the implementation of the Schengen Convention has not yet been embraced uniformly

¹⁷⁰ Vermeulen, 'How far can we go in applying the principle of mutual recognition', in C. Fijnaut and J. Ouwerkerk, *The Future of Police and Judicial Cooperation in the European Union* (Martinus Nijhoff Publishers, 2010), pp 241-257; See in relation to Australia: Report of the Leaders Summit on Terrorism and Multijurisdictional Crime, *Cross-Border Investigative Powers for Law Enforcement* November 2003, iii and iv.

¹⁷¹ See at <http://www.pcc.gov.au/uniform/National%20Uniform%20Legislation%20table.pdf>, retrieved 06/06/2010.

across the EU. State actors in both systems, often citing sovereignty concerns, therefore have the capacity to impede significantly harmonisation processes.

The assumption that harmonisation of laws in the field of police cooperation would more likely be achieved amongst Australian jurisdictions, due to their similarity has, therefore, been disproved. The question arises as to why the Australian jurisdictions do not cooperate more readily than EU Member States. A possible approach to answering the question may be found in the discipline of social psychology. According to the in-group projection model, as outlined above, sub-groups formed under the umbrella of a superordinate group enter more readily into conflict and competition in relation to their prototypicality (individuality) rather than developing better sub-group relations under the common framework.¹⁷² Applying this model very loosely to the comparison between Australia and the EU, police cooperation within both systems could be hampered by the existence of an overarching entity. Consistent with this model, states and territories within Australia and in the EU may object to surrendering their sovereignty rights in the field of law enforcement, thereby inhibiting cooperation. However, Wenzel *et al.* further identify that sharing a common super-ordinate identity is not sufficient to develop positive sub-group relations, though similar sub-groups could develop positive relations more easily than dissimilar sub-groups.¹⁷³ It would follow that Australian states and territories, due to their structural, organisational and cultural similarities, would cooperate more successfully than EU Member States. However, according to the research findings presented here, this is not the case.

It is interesting to note that cooperation has been successfully developed between EU Member States with less prominent differences between cultures and languages, particularly in the Nordic countries. The Nordic cooperation scheme is even considered to be 'best practice' in the EU.¹⁷⁴ It could, therefore, be concluded in the EU context that similar sub-groups cooperate better than different sub-groups, which contradicts the Australian experience.¹⁷⁵ Australian sub-groups seem to feel a greater need to preserve their prototypicality than these Nordic states. Hence, it could be concluded that different nation states, as they retain a greater amount of national identity and control, even when surrendering sovereignty in specific areas, are more likely to cooperate than Australian states and territories. However, another suggestion within the same model is that greater prototypicality is advantageous for sub-groups, also in relation to their relationship with the superordinate group.¹⁷⁶ This supports a prior conclusion that sovereign nation states, due to their greater sense of individuality, are more secure and confident in cooperating with each other without fear of giving up their identity to the superordinate group. It can be argued that resistance to harmonisation in Australia is due to the struggle for preserving individuality among its states and territories, which may be termed as 'a fear of insignificance'. Here, the concepts derived from social psychology are only broadly used. However, further research in this area could shed greater light on state behaviour in a

¹⁷² Wenzel, Mummendey and Waldzus 'Superordinate identities and intergroup conflict: The ingroup projection model', (2007) 18 *European Review of Social Psychology* 331.

¹⁷³ *ibid.*

¹⁷⁴ *EU Schengen Catalogue, Volume 4, Police Co-Operation: Recommendations and Best Practices* (Council of the European Union, General Secretariat, June 2003), p. 16.

¹⁷⁵ See for further discussion C. Joubert and H. Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights* (Kluwer Law International, 1996), p 7; Gammelgård, 'International Police Cooperation from a Norwegian Perspective', in D. Koenig and K. Das (eds), *International Police Cooperation: A World Perspective* (Lexington Books, 2001), pp 232-234; Takala, 'Nordic Cooperation in Criminal Policy and Crime Prevention', (2005) 5(2) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 131; Larsson, 'International Police Co-Operation: A Norwegian Perspective', (2006) 13(4) *Journal of Financial Crime* 456.

¹⁷⁶ Wenzel, Mummendey and Waldzus 'Superordinate identities and intergroup conflict: The ingroup projection model', (2007) 18 *European Review of Social Psychology* 331, 338.

supranational union and a federal entity, which could provide further insights on the processes of harmonisation in the field of police cooperation in both systems.

By contrasting the EU with the Australian federal system, the article suggests that the 'fear of insignificance' and the resulting opposition to the harmonisation process may intensify between similar state entities, perhaps because similar entities feel a greater need to assert their individuality.¹⁷⁷ An implication of this insight, counter-intuitively, is that the 'similarity' of cooperating entities may actually inhibit the degree of harmonisation achievable. It appears that entities that are very different (in terms of laws and police organisational structures) do not have to assert their individuality as much, as their individuality is more apparent and obviously taken into account to a higher degree by the overarching entity. As a result, the differences in EU systems can even be considered an advantage for promoting cooperation and harmonisation, while the similarities within the Australian system can be considered a disadvantage. By examining the efforts in the area of cross-border policing within the Australian federal system, the challenges of cooperation within the EU are brought into sharp relief. According to the theory outlined here, harmonisation processes may become more difficult to achieve as EU Member States grow closer together under the EU integration framework in the field of justice and police cooperation. To avoid this, harmonisation processes may need to take into account the individualism of national actors (the 'fear of insignificance') by avoiding 'top down' strategies that infringe upon individualism at the lower level, and should include an incentive structure for compensating and rewarding states contributing to harmonisation efforts. As with the police practitioners involved, incentives must be provided for states that cooperate across borders, in addition to public recognition for this cooperation.

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¹⁷⁷ *ibid* 331-372.

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