

NEW DIRECTIONS IN CO-OPERATIVE FEDERALISM: REFERRALS OF LEGISLATIVE POWER AND THEIR CONSEQUENCES

(delivered at the 2005 Constitutional Law Conference in Sydney on 18 February 2005 by
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1. It has been notorious since at least *Re Wakim* that the concept of co-operative federalism is “not a criterion of constitutional validity or power.”¹ Where there is an absence of power, because, for example, no State legislature singly, nor jointly with the Commonwealth, can confer State jurisdiction or State judicial power on federal courts, the concept of co-operative federalism cannot itself provide the power. As Justice McHugh pointedly remarked:

Where constitutional power does not exist, no cry of co-operative federalism can supply it. If the object lies outside the reach or the effect of what a State or the Commonwealth can constitutionally do, the subject matter is beyond the reach of the legislatures of Australia.²

2. This is not to deny, however, that the concept of co-operative federalism does indeed lie at the heart of the Commonwealth Constitution. As Justice Deane observed in *The Queen v Duncan*:

co-operation between the Parliaments of the Commonwealth and the States is in no way antithetic to the provisions of the Constitution: to the contrary, it is a positive objective of the Constitution.³

3. Providing then that each Parliament within the Federation legislates within the confines of its powers, the process of co-operation between the States and the Commonwealth “may achieve an object that neither could achieve by its own

¹ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, at 556 [54] (McHugh J.).

² *Ibid*, [55].

³ *The Queen v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535, at 589.

legislation.”⁴ Indeed, this has been viewed as the defining quality of co-operative federalism, viz, “the ability of parties to the federal compact to exercise their respective legislative powers to produce a result which one of them alone would not have been able to produce”.⁵

4. One of the measures, perhaps the principal measure, provided by the Constitution to enable such co-operation to occur is the power conferred upon the Commonwealth Parliament by s.51(xxxvii) of the Constitution to make laws for the peace, order and good government of the Commonwealth with respect to, in the words of s.51(xxxvii):

matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

5. This is the referrals power which is the topic of this speech. I intend to consider the history of its inclusion within the Constitution and examine the continuing debate and uncertainty about its legal operation and effect. I also want to say a few words about the consequences of referrals by examining the attempt which has been made in the *Corporations Act* 2001 (Cth) to avoid the problem of constitutional inconsistency.

⁴ *Re Wakim ; Ex parte McNally* (1999) 19 CLR 511 at 556 [55] (McHugh J., citing as an example *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 (the setting up a tribunal to deal with both interstate and intra-state disputes in the coal industry)).

⁵ *BP Australia Ltd v Amann Aviation* (1996) 62 FCR 451 at 493 (Lindgren J.). Indeed, Justice Selway has argued that the core concept within the Constitution, “namely its federal structure, was and is entirely unworkable but for the co-operation of the legislatures and executives... of the Commonwealth and the states ... [for] [w]ith some exceptions the Commonwealth cannot achieve ‘national’ policies without the co-operation and use of the legislative and executive powers of the states.” Bradley Selway, “The Federation – What Makes it Work and What Should We Be Thinking About for the Future”, (2001) *Australian Journal of Public Administration* 60(4), 116 at 119.

The History of the Referrals Power

6. To turn then first to the history of the referrals power. It was discussed principally at the Convention Debates in Melbourne in 1898.⁶ A similar power had earlier been conferred on the Federal Council.⁷
7. By the time the provision came to be debated in Melbourne significant questions were raised about the legal operation and effect of a referral. Some of these questions have not yet been definitively answered today. The most significant and vexed questions raised were three-fold: (1) whether a reference could be revoked by a State; (2) whether a referral deprived a State of the legislative power to make laws on the same matter; that is, whether the Commonwealth acquired an exclusive power to make laws on the matter referred; and (3) the continuing constitutional status of federal laws made by reason of a referral if the reference were to be revoked or otherwise expire. The responses given to these three questions reflect the different conceptions of the role and function of s.51(xxxvii), that is, whether it is seen as a

⁶ *Official Record of the Debates of the Australasian Federal Convention* (Third Session), Melbourne, 20 January to 17 March, 1898 ("Melbourne Debates"), 215-225.

⁷ By s. 15(i) of the *Federal Council of Australasia Act* 1885 (Imp.). This allowed for the referral to the Council, in addition to a list of enumerated powers, of "any other matter of general Australasian interest with respect to which the Legislatures of the several colonies can legislate within their own limits, and as to which it is deemed desirable that there should be a law of general application." The law would extend only to those colonies whose legislatures had referred it or who afterwards adopted it: see Anne Twomey, *The Constitution of New South Wales* (2004) (Federation Press), 806. Quick J. & Garran R.R. (1901) *The Annotated Constitution of the Australian Commonwealth*, reprinted by Legal Books, Sydney, 1976, note (at p. 648) that the origins of the power can be traced to the scheme for the establishment of a General Federal Assembly first recommended by the Committee of the Privy Council in its Report of 1849. The powers to be conferred on the General Assembly included the "enactment of laws affecting all the colonies represented in the General Assembly on any subject not specifically mentioned in [the] list, and on which it should be desired to legislate by addresses presented to it from the legislatures of all the colonies": See the Australian Constitutions Bill (No 2) 1850 (Imp.). This was removed from the Bill during its passage through the House of Lords.

means of transferring or re-distributing legislative power between the Parliament without the need for a formal amendment to the Constitution and the strictures of s.128, or whether it is seen as a mechanism for co-operative federalism, as defined.

8. On the first question, Deakin made it plain that in his view no revocation was possible. On this Isaacs and Barton agreed.⁸ Deakin said:

Another difficulty of the sub-section is the question whether, even when a state has referred a matter to the federal authority, and federal legislation takes place on it, it has any - and, if any, what - power of amending or repealing the law by which it referred the question? I should be inclined to think that it had no such power, but the question has been raised, and should be settled. I should say that, having appealed to Caesar, it must be bound by the judgment of Caesar, and that it would not be possible for it afterwards to revoke its reference.⁹

9. Quick responded that, although there was a difference of opinion on the matter, and in his view a State could repeal the law it made referring a matter,¹⁰ if a reference was irrevocable, it would improperly have become:

an amendment of the states' Constitution, incorporated in and engrafted on the Federal Constitution without the consent of the people of the various states.¹¹

It was this consideration which founded Quick's reluctance to support the inclusion of a referrals power within the Federal Constitution. He said:

My principal objection to the provision is that it affords a free and easy method of amending the Federal Constitution without such amendments being carried into effect in the manner provided by this Constitution.¹²

On this view, a referral would be a form of quasi-amendment which would act as a direct expansion of the otherwise specifically enumerated Commonwealth legislative powers.¹³

⁸ Melbourne Debates, p.218 (Barton); p.223 (Isaacs).

⁹ Ibid, p.217.

¹⁰ Ibid, p.218: "I myself agree with the Premier of Victoria that there is power to repeal, and, consequently that the power of reference is not an ultimate power".

10. Quick further assumed, in response to the second question of exclusivity, that “once a state has referred a matter to the Federal parliament of course it cannot deal with it itself.”¹⁴ This appeared to be almost common ground at the Debates eliciting the response that the provision would give the Parliaments of the States the power to “give away their sovereign powers without the consent of their people”¹⁵ or “[t]o commit political suicide” as Deakin put it.¹⁶
11. On the third question, the continuing operation of federal legislation passed in reliance upon a referral, Mr Symon (later the Attorney-General for South Australia), while accepting that a State could revoke a reference, took the view that, if the Federal Parliament had legislated in reliance upon the reference, then the law made “would become federal law for all time until the Federal Parliament repealed it.”¹⁷ He recommended that the sub-section be struck out altogether¹⁸ in part because he saw it as inconsistent “with the foundation of our Federal Government” and the declaration of specific enumerated powers to be entrusted to the federal Parliament.¹⁹
12. It was Isaacs who keenly observed that the object of the provision was to allow for the recognition that in addition to these specific powers, all of which were on matters

¹¹ Ibid, p.218.

¹² Ibid, p.218.

¹³ Quick noted that the powers of the Federal Parliament were “define[d] ... in specific paragraphs ... [yet] if, under this sub-section power be given to the state Parliaments to refer other matters to the Federal Parliament, to that extent the powers of the Federal Parliament are enlarged, and therefore there is an enlargement of the Constitution. This enlarges the power of the Federal Parliament, and when a law is passed by the Federal Parliament, it becomes binding on the citizens of the states the Parliaments of which have made reference; and if these laws are binding, I say they become federal laws, and those federal laws may be administered by federal courts. Consequently, those referred powers become federal powers, and to that extent this becomes a means of amending the Federal Constitution.” (ibid, at p. 218).

¹⁴ Melbourne debates, p.218.

¹⁵ Mr Glynn (South Australia), Melbourne debates, p.225.

¹⁶ Melbourne debates, p.225.

¹⁷ Melbourne debates, p.219.

¹⁸ Melbourne debates, p.219.

¹⁹ There was also considerable discussion as to how the Commonwealth Parliament could provide any necessary revenue for the operation of the law, if a law made in reliance upon a referral was confined in

then recognized as of common concern, there might yet be other matters of common concern which could arise that were not then regarded as such or had not yet arisen in any way.²⁰ Matters where the reach of a law by any individual State would be insufficient. Moreover, the matter might only concern two or three States but not be of sufficient magnitude to require a formal “revision” of the Constitution.²¹ In support of this view, Barton remarked that the provision was “not a restriction but an enlargement of the legislative powers of the States.”²² The sub-section was agreed to.²³

13. Early attempts at referrals were unsuccessful. Agreements were made, usually at Premiers’ Conferences, to submit proposals to State Parliaments on matters to be referred, with the objective of uniformity, but by the time of the Report on the Royal Commission on the Constitution in 1929 no reference to the Commonwealth Parliament by all the States simultaneously had ever been made.²⁴ Early attempts on the referral of the matter of industrial conditions and the control of air navigation had come to nothing.^{25 26}

its operation to one or two States. Barton suggested that a power to raise money for a relevant purpose could be included in the reference (at p.223).

²⁰ Melbourne debates, p.222.

²¹ Melbourne debates, p.220 (Sir John Downer, South Australia).

²² Melbourne debates, p. 224.

²³ There was one drafting alteration, viz. “is” was substituted for “was” in the copy of the Commonwealth of Australia Bill as revised by the Drafting Committee. The substitution was not discussed.

²⁴ *Report of the Royal Commission on the Constitution*, (1929), p.182.

²⁵ The early attempts had included an agreement in 1909 on the referral of the matter of industrial conditions, which came to nothing. After the issuing of writs for a s.128 referendum, the idea was resuscitated in 1915 that the Premiers would submit to the State Parliaments proposals for a reference on industrial conditions for the period of the war and one year thereafter. After the writs were withdrawn, Bills were introduced in all the States but only the State of New South Wales passed the necessary legislation. *Commonwealth Powers (War) Act* 1915 (NSW). This expired on 9 January 1921.

²⁶ In 1920 and 1921 legislation was introduced in some of the States for the referral of the matter of the control of air navigation but neither in New South Wales nor in Western Australia were the relevant Bills passed and the *Commonwealth Air Navigation Act* 1920 was never proclaimed. Bills were passed in Victoria, Tasmania, Queensland and South Australia: *Commonwealth Powers (Air Navigation) Act* 1920 (Vic); *Commonwealth Powers (Air Navigation) Act* 1920 (Tas); *The Commonwealth Powers (Air Navigation) Act* 1921 (Qld); *Commonwealth Powers (Air Navigation) Act* 1921 (S.A.). Only the

14. The source of at least some of this reluctance to refer can be traced to doubts about the effect of a referral. These doubts were still being expressed at the time of the Royal Commission including the continuing uncertainty as to whether a reference, once made, could be withdrawn, or whether, as it was put, “the power practically amounts to an amendment of the Constitution giving certain additional power to the Commonwealth.”²⁷ The conundrum of the third question, the continuing operation of federal laws based upon a withdrawn or expired referral, was expressed in 1929 in this way: if the Commonwealth had legislated in reliance upon the reference and the reference was later revoked, the revocation by the States would not itself repeal the Commonwealth law, but nor would the Commonwealth have any further power to repeal or amend the law it had made. The Commonwealth would have no further power over the matter. The law would remain in limbo. There was also a fresh uncertainty on the form of a reference – that is, whether a reference could be made either in general terms (a “subject-matter” reference) or in the terms of a draft Act (a text-based reference).²⁸
15. Many of these uncertainties expressed themselves by means of a “repletion of opinions”²⁹ between Commonwealth and State advisors in 1942 on a model draft Bill on “Commonwealth Powers” for the referral of a host of enumerated matters in relation to post-war reconstruction, including the matter of returning soldiers and their dependents and prices and profiteering. The model Bill contained an express time-limit. The referral was to be “for a period ending at the expiration of five years

Tasmanian Act came into operation. It was repealed by the *Air Navigation Act 1937* (Tas) (I Geo. VI, No. 14).

²⁷ *Report of the Royal Commission on the Constitution* (1929), p. 74.

²⁸ *Report of the Royal Commission on the Constitution* (1929), p. 182. See the Evidence of Sir Edward Mitchell on 12 December 1927 at 763-764. See also Ross Anderson, “Reference of Powers by the States to the Commonwealth” (1951) II *University of Western Australia Law Review* 1 at 4.

²⁹ “Senex”, “Commonwealth Powers Bill – A Repletion of Opinions” (1943) 16 *Australian Law Journal* 323.

after Australia ceases to be engaged in hostilities in the present war”.³⁰ There was agreement that it was desirable that the reference not be revoked during this period.³¹

Attempts were made to resolve the conundrum raised by the third question in that the referral also contained a self-termination provision with respect to the laws made by the referral.³²

16. On one side of the dispute stood the advisors in Victoria, including Mr W. K. Fullagar K.C. advising the Victorian Chamber of Commerce, and Mr Ham K.C., advising the Victorian Government. They each took the view that a reference was neither revocable, nor could be limited in time: “The Constitution, maintained Mr Ham, authorized a gift, but not a loan, of powers by the States to the Commonwealth.”³³ On the other side were the Commonwealth advisors, Sir Robert Garran K.C., Sir George Knowles and Professor Kenneth Bailey who reviewed the draft Bill, as it was described “with all the affection of authorship”³⁴, finding no ground for accepting that a State Parliament cannot define or limit the scope of the matter referred, whether it be by the imposition of a time-limit upon the reference³⁵

³⁰ Ibid, p. 324.

³¹ See *Graham v Paterson* (1950) 81 C.L.R. 1 at 17.

³² The model Bill provided that: “no law made by the Parliament of the Commonwealth with respect to matters referred to it by this Act shall continue to have any force or effect, by virtue of this Act or the reference made by this Act, after the expiration of that period.”

³³ “Senex”, op. cit., p.324.

³⁴ Ibid, p.324.

³⁵ “Senex” described (at p. 325) the opinion of the Commonwealth legal advisers in these terms: “ ‘A gift,’ they said, ‘need not be a monument more lasting than brass, and higher than the Pyramids: it might be something perishable and insignificant. It rests with the giver to decide what he gives: a fee simple or a term of years: an everlasting ‘matter’ or an ephemeral one.’” On this latter aspect, Sir Robert Garran appeared to have resolved some earlier doubts: see the evidence of Sir Robert Garran to the Royal Commission on 19 September 1927 where he said he had “always considered that the real effect of this section must be that if the Parliament of the State refers a matter the reference is an irrevocable one, and the power practically amounts to an amendment of the Constitution giving certain additional power to the Commonwealth” (*Report of the Royal Commission on the Constitution*, at 74) together with his remarks in his commentary, “The Aviation Case, *R v Burgess; Ex parte Henry*” (1936) 10 *Australian Law Journal* 297, at 300, expressing: “doubt whether a reference when made, is final, or is revocable at will by a State Parliament”, and his drafting and support for the model Commonwealth Powers Bill which specified a time limit for the expiry of the reference. While a distinction can be drawn between the specification of a time limit and revocability at will, this nevertheless suggests that Garran came to accept that a reference from the States did not involve a transfer of power. The link

and/or by a stipulation that the only law authorized by the reference be in the exact form specified in the referring Act, a text-based reference.

17. As to our second question, Sir Robert Garran expressed the view that the power of the Commonwealth Parliament to make laws with respect to referred matters was an exclusive power which, for the period referred, “could only be vested in and effectually exercisable by the Federal Parliament.”³⁶ This was directly contradicted by the Victorian advisers, especially by Mr Ham with whom Fullagar subsequently agreed.³⁷
18. With respect to our third question, it was the view of the then Commonwealth Attorney-General that the Commonwealth law would cease to operate upon the expiry of any time-limit upon which a reference was conditional. This view was shared by the then Victorian Parliamentary Draftsman, Mr R.C. Normand, who suggested that, regardless of whether a law contained, as the model Commonwealth Powers Bill did, a self-termination provision for the laws supported by the referral, the federal laws must come to an end. He wrlly observed that:

[if] legislation passed by the Commonwealth Parliament during the period of reference [would], at the expiration of the period, continue to operate, unsupported and immutable, that could only be regarded as a miracle of legal levitation or a kind of constitutional variation of the fabulous Indian Rope Trick.³⁸

between the two is made by Taylor J. in *Airlines of N.S.W. Pty Ltd v New South Wales* (1964) 113 CLR 1 at 38 when he said: “ However, the further suggestion was made that ‘matters’ once referred to the Parliament of the Commonwealth by the Parliament of a State are irrevocably committed as subject-matters with respect to which the Commonwealth Parliament may make laws. Such a proposition would, of course, deny to the Parliament of the State power to refer matters for a limited or specified period.”

³⁶ “Senex”, op. cit., p.326.

³⁷ Mr Ham said that the powers of the States to “legislate, in respect of the matters conferred, would continue to exist concurrently with that of the Commonwealth Parliament.” (Ibid, p. 326).

³⁸ The Bill itself provided that “no law made by the Parliament of the Commonwealth with respect to matters referred to it by this Act shall continue to have any force or effect, by virtue of this Act or the

19. Doubts over the constitutional validity of the post-war reconstruction referrals were voiced in the popular Press with one journalist quipping that it was:

necessary to keep in mind that the effect of the scheme will, if one day challenged, be determined not by lawyers, however experienced, but by the High Court.³⁹

Enter the High Court

20. In *Graham v Paterson* (1950) 81 CLR 1, the High Court took its first opportunity to lay down some principles governing the scope and operation of referrals. The facts were simple. The case arose out of a prosecution for profiteering under Queensland's *Profiteering Prevention Act* of 1948 brought against partners in a bakery business in Coolangatta who sold a loaf of bread at a price of 8 pence, being a greater price than the regulated maximum within the State of 7 and a half pence. The defendants argued in the High Court that the Queensland Act was ultra vires the powers of the Queensland Parliament and invalid in that the Parliament had referred "the matter of profiteering and prices" to the Parliament of the Commonwealth as part of the matters referred in its *Commonwealth Powers Act* of 1943. Latham CJ definitively rejected that argument saying:

[t]he essence of the appellants' argument is that the 1943 Act is valid and that it deprived the Queensland Parliament of power to make laws with respect to the matter referred – as in the case of a transfer of property where, after the transfer has been made, the transferor has not, and the transferee has, the property which has been transferred. This analogy is not in my opinion applicable. ... Section 51 (xxxvii.) does not provide that any power of the Parliament of a colony which becomes a State should become exclusively vested in the Commonwealth Parliament or be withdrawn from the Parliament of the State. It is s.52, and not s.51, which gives exclusive powers to the

reference made by this Act, after the expiration of that period." Mr Normand relied on general constitutional principles independently of the terms of the Bill.
"Senex", op. cit., p.327.

Parliament. Therefore the powers of the State Parliament are not diminished when an Act is passed to refer a matter under s.51 (xxxvii.).^{40 41}

21. The other Justices agreed, some emphasizing s.106 of the Constitution which preserves the Constitutions of the States and some emphasising s.107 which preserves a State's legislative powers.⁴² Thus, *Graham v Paterson* provides an authoritative answer to our second question, viz., that a referral confers only a concurrent power upon the Commonwealth.
22. On the vexed first question, revocability, Chief Justice Latham found that it was unnecessary to decide the issue in that case but expressed the view that a reference could be revoked. He said, as it were in support of the position adopted by Quick, Symon, ultimately by Sir Robert Garran, by Sir George Knowles and Professor Kenneth Bailey, and in opposition to that declared by Deakin, Isaacs, Barton, Ham and W.K. Fullagar, that:⁴³

It has sometimes been suggested that a reference under s.51(xxxvii.) must be an irrevocable reference for all time – that while the matter referred must

⁴⁰ *Graham v Paterson* (1950) 81 CLR 1, at 18-19.

⁴¹ Latham CJ had expressed the same view earlier, in an obiter comment, in *South Australia v The Commonwealth* (1942) 65 CLR 373 at 416. He said: "A State Parliament could not bind itself or its successors not to legislate upon a particular subject matter, not even, I should think, by referring a matter to the Commonwealth Parliament under sec. 51 (xxxvii.) of the Constitution – but no decision upon that provision is called for in the present case."

⁴² McTiernan J. emphasized s.107: (1950) 81 CLR 1, at 22. Section 107 of the Constitution preserves the legislative powers of the States under the Constitution; it provides: "Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be." Justice Williams also expressed the same view as Latham CJ remarking that if the reference of a matter conferred an exclusive legislative power on the Commonwealth it would effect an alteration in the Constitution of a State by depriving a State of power to legislate on a matter which it could only do so "by virtue of the words 'subject to this Constitution' in s.106 but the words of the paragraph appear ... to be no more than an authority for the Commonwealth Parliament to legislate on that matter and quite insufficient to effect such an alteration": (1950) 81 CLR 1, at 24. (Section 106 provides: "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." Webb J. (at 25) and Fullagar J. (at 26) agreed with the Chief Justice.

⁴³ (1950) 81 CLR 1, at 18.

necessarily be described by reference to its attributes or qualities, yet the reference cannot be limited by reference to a quality or attribute of a temporal character. Such a contention would involve the proposition that a State Parliament can pass an unrepealable statute, or at least that any attempt to repeal an Act referring a matter under s.51(xxxvii.) would necessarily produce no result. The result of the adoption of such a suggestion would be that one State Parliament could bind all subsequent Parliaments of that State by referring powers to the Commonwealth Parliament.⁴⁴

23. This question of revocation was almost given an authoritative answer by the High Court in *The Queen v Public Vehicles Licensing Appeal Tribunal (Tas.); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, where the Court, led by Sir Owen Dixon, delivered a joint judgment to the effect that the matters referred by a State may validly contain, in advance, a limitation of time, for example, a self-executing sunset clause, or a limitation defined by reference to future executive action of the State. Looking closely at the words of s.51(xxxvii), the Court said:

There is no reason to suppose that the word “matters referred” cannot cover matters referred for a time which is specified or which may depend on a future event even if that event involves the will of the State Governor-in-Council and consists in the fixing of a date by proclamation.⁴⁵

24. However, the Court preferred not to express a final opinion on the related question of revocation, nor did it express any opinion on the question of continuing operation.⁴⁶ The Court did pronounce, however, that on the question of the form of a reference there was no need to restrict it to the conversion of a specific text of a Bill into a law – the reference could be defined however the State chose including by means of a general subject matter.⁴⁷

⁴⁴ Webb J. also remarked that he did “not think it was intended that a State Parliament could bind its successors to that extent”: (1950) 81 CLR 1, at 25.

⁴⁵ (1964) 113 CLR 207 at 226.

⁴⁶ The Court did say (at 226) that it is “the general conception of English law that what Parliament may enact it may repeal.” See also *Kartinyeri v Commonwealth* (1988) 195 CLR 337, 355 (Brennan CJ and McHugh J); 368-9 (Gaudron J.) and 372, 376 (Gummow and Hayne JJ.).

⁴⁷ (1964) 113 CLR 207 at 225: “It seems absurd to suppose that the only matter that could be referred was the conversion of a specific bill for a law into a law.”

25. There has never yet been an authoritative statement from the High Court on the third question; however in *Airlines of New South Wales Pty Ltd v New South Wales*,⁴⁸ Windeyer J commented that “[a]ny law made by the Commonwealth Parliament with respect to a subject referred for a limited period, could, I consider, only operate for the duration of the period of the reference.”⁴⁹ At the expiry of the reference the federal Act would no longer have a continuing operation because, as Ross Anderson put it, “the essential basis for its validity had gone.”⁵⁰ However, more recently Justice French, extra-judicially, has squarely faced the question of:

[W]hat happens to a Commonwealth law passed pursuant to the referral power if referral by the State is terminated, whether according to a self-executing sunset clause or by revocation.

He has, perhaps bravely, proffered the view, that:

Absent any other provisions, it would be expected that such a law would continue in force for there is nothing in the grant of the power which makes the laws under it self-terminating upon revocation of the referral.⁵¹

He would no doubt reject the analogy of the Indian Rope trick.

He noted that the *Corporations Act* does not include any provision that the termination of the law is to follow from the termination of the referral.

⁴⁸ (1964) 113 CLR 1. The case concerned an alleged s.109 inconsistency between ss. 12 and 28 of the *State Transport (Co-ordination) Act* 1931-1956 (NSW), relating to licensing of aircraft operating within New South Wales and the provisions of the *Air Navigation Act* 1920-1961 (Cth). The Court held there was no inconsistency.

⁴⁹ (1964) 113 CLR 1 at 52-3.

⁵⁰ Ross Anderson, op. cit., at 8. He says further (at 8): “[T]he true basis of the federal power to make laws with respect to referred matters would appear to be *and to remain* the reference by the State. The validity of any federal law under section 51(xxxvii) must be determined primarily by the terms of the reference. If the reference was for a matter up to a certain date, a federal law dealing with that subject after that date is not a law with respect to the referred matter. The difficulty experienced by many authorities seems to have been in conceiving the federal Parliament to have a power at one time but to cease to have it at another. Such a conception should no longer be difficult since it is precisely what happens with the defence power. Numerous cases since the last war have demonstrated that the federal Parliament has power to do many things in the name of defence during a time of active hostilities which it has no power to do after hostilities have ceased”, citing *Dawson v Commonwealth* (1946) 73 CLR 157, *Crouch v Commonwealth* (1948) 77 CLR 339, and *R v Foster* (1949) 79 CLR 43.

⁵¹ French, “The Referral of State Powers” (2003) 31 *University of Western Australia Law Review* 19, at 33.

26. What has been universally accepted, however, is that a law made by the Commonwealth Parliament in reliance upon a reference is a genuine federal law. It thereby acquires the preeminence prescribed by s.109 of the Constitution. The Commonwealth Parliament is not acting as a delegate of the State Parliament or on its behalf.⁵² As Ross Anderson noted:

A reference under section 51(xxxvii) is not a delegation of power from a superior to a subordinate body ... it ... empower[s] the federal Parliament to make laws which in one respect have a superior efficacy to those of the State Parliament; by virtue of section 109 a federal law enacted pursuant to a reference will override even a *later* State Act inconsistent with it. A State parliament cannot confer such a power on any subordinate body. Para. (xxxvii) does not speak of the reference of *powers*, but merely the reference of *matters*. The extent of the *power* to deal with a matter referred is therefore, it would seem, to be determined not by reference to the constitutional powers of the State parliament, but to the constitutional powers of the federal Parliament.⁵³

27. These sentiments echo what was recognized by McTiernan J. in *Graham v Paterson*:

A power which is defined in ... terms [of s.51(xxxvii)] cannot be a State legislative power that has become vested in the Commonwealth. It is truly a Commonwealth power.⁵⁴

28. Since the 1980's there have been numerous referrals, both text-based and defined by a general subject-matter, which have led to the successful enactment of Commonwealth laws.⁵⁵ Noteworthy amongst these are referrals from 1986 to 1990 from the States of New South Wales, South Australia, Victoria, Tasmania and Queensland of matters relating to the custody and maintenance of ex-nuptial children which resulted in the enactment of a relevant amendment to the *Family Law Act*

⁵² See *Airlines of New South Wales Pty Ltd v New South Wales* (1964) 113 CLR 1, at 53 where Windeyer J. stated: "If a matter be referred by a State Parliament, that matter becomes, either permanently or *pro tempore*, one with respect to which the Commonwealth Parliament may under the Constitution make laws. If the Commonwealth Parliament then avails itself of the power, it does so by virtue of the Constitution, not by delegation from, or on behalf of the State Parliament. ... It is exercising the legislative power of the Commonwealth Parliament conferred by s.51 of the Constitution."

⁵³ Anderson, op. cit., at 6.

⁵⁴ (1950) 81 CLR 1 at 22.

1975 (Cth).⁵⁶ This has recently been supplemented in 2003 by referrals from Victoria, New South Wales and Queensland of certain financial matters arising out of the breakdown of a de facto relationship involving the maintenance and distribution of the property of de facto partners, including prospective superannuation entitlements. These referrals have been formulated by reference to two separate definitions of de facto couples, one of couples of different sexes and the other, of couples of the same sex. Constituting two separate matters, the Commonwealth can choose to legislate with respect only to de facto couples of different sexes and not with respect to those of the same sex, or, of course, conversely.⁵⁷

29. During 2002 and 2003 all the States referred a matter, expressed as a Bill, to regulate the prosecution of terrorists. The references are fixed in time and otherwise may be terminated by proclamation. This has resulted in the enactment of the federal *Criminal Code Amendment (Terrorism) Act 2003*.
30. A significant referral, and perhaps the best example of the new co-operative federalism, has been, of course, the text-based referral of the matters of the formation of corporations, corporate regulation and the regulation of financial products and services resulting in the Commonwealth legislation, the *Corporations Act* and the *Australian Securities and Investments Commission Act 2001* (Cth). This has truly been an example where the process of co-operation between the States and the

⁵⁵ See, more generally, the Schedule to this paper, "Examples of Referrals from State Parliaments to the Commonwealth Parliament under s section 51(xxxvii) of the Constitution".

⁵⁶ Section 60(e).

⁵⁷ Noteworthy amongst recent referrals include those made in 1992 by New South Wales and Queensland with respect to the matter of regulatory standards in Australia in relation to goods and occupations. This led to the enactment of the federal *Mutual Recognition Act 1992* (Cth), which includes regulation of the legal profession. The federal Act has been adopted by Victoria, South Australia, Western Australia and Tasmania. In 1996 Victoria alone referred the matter of "conciliation and arbitration for the prevention of industrial disputes within Victoria" and agreements pertaining to the relationship between employer and employee and so on. This led to the enactment of Part XV of the federal *Workplace Relations Act 1996* which provides the source of minimum terms and conditions for

Commonwealth has “achieve[d] an object that neither could achieve by its own legislation,”⁵⁸ nor could be achieved jointly by mirror legislation, given the background of the pronouncements of the High Court in the corporations case⁵⁹ and the deficiencies of the company law schemes.⁶⁰

31. It is the significance of the *Corporations Act* as a truly Commonwealth law which has been far reaching, and it is in this context, and to my knowledge no other, where a detailed set of prescriptions governing the construction of provisions of the Act are laid down within the Act with the intention of dealing with a consequence of referral, that is, the risk of an inconsistency under s.109 between the federal law enacted in reliance upon the referral and other State laws.
32. These detailed directions for statutory construction are contained in Part 1.1A of the *Corporations Act* entitled “Interaction between Corporations Legislation⁶¹ and State and Territory Laws.” They contain firstly, in s.5E, a provision that there is no intention to cover the field. Such a provision is now commonplace.⁶²
33. Section 5F allows for a State to declare a matter an excluded matter from the provisions of the Corporations legislation. But it is s.5G which is the most significant for our purposes, in particular sub-sections (4), (8) and (11). In summary,

Victorian workers not covered by a federal award, certified agreement or an Australian Workplace Agreement.

⁵⁸ See above, *Re Wakim; Ex parte McNally* (1999) 19 CLR 511 at 556 [55] (McHugh J.).

⁵⁹ In *New South Wales v Commonwealth* (1990) 169 CLR 482 the High Court had held that the Commonwealth’s corporations power (s.51(xx)) does not extend to laws governing the formation of corporations but only to those trading and financial corporations already formed within the limits of the Commonwealth.

⁶⁰ See *Re Wakim; Ex parte McNally* (1999) 19 CLR 511; *R v Hughes* (2000) 202 CLR 535.

⁶¹ “Corporations Legislation” is defined in s. 9 to mean the *Corporations Act*, the ASIC Act and various rules of court.

⁶² An example of such a provision was upheld as valid in *Re Credit Tribunal ; Ex parte General Motors Acceptance Corp. Australia* (1977) 137 CLR 545, see Barwick CJ at 552. The section expands upon the provision upheld as valid in *GMAC* by providing that the Corporations legislation does not intend to exclude or limit the concurrent operation of a law of a State or Territory which impose additional obligations or liabilities or confers additional powers on a director or company, and so on.

sub-section (4) says that a provision of the Corporations legislation does not prohibit the doing of an act or impose a liability for doing an act if a State law specifically authorizes the doing of the act. Sub-section (8) says that Chapter 5 of the *Corporations Act* (regulating external administration) does not apply to a scheme of arrangement, receivership, winding up or other external administration of a company to the extent that it is carried out in accordance with a provision of a law of a State. Sub-section (11) is a catch-all, to the effect that a provision of the Corporations legislation does not operate in a State or Territory to the extent necessary to ensure that no inconsistency arises between the provision of the Corporations legislation and the provision of a law of the State or Territory that would, but for that sub-section, be inconsistent with the provision of the Corporations legislation.

34. Cheryl Saunders, Ian Govey and Hilary Manson have referred to Pt 1.1A as providing “an automatic roll-back mechanism”⁶³ to accommodate otherwise applicable State and territory legislation so as to avoid the direct inconsistency which might otherwise flow by reason of the Corporations legislation having the status of federal law, having been enacted by the Commonwealth Parliament in reliance upon the referrals. One might see this roll-back mechanism as part of the exchange to the States for the referrals.
35. It yet remains to be seen whether the inventive roll-back mechanism will work. It has been considered in detail in 2 cases. The first was heard in 2002 in the Victorian Supreme Court: *DPP v Tat Sang Loo*.⁶⁴ Ashley J. held that the catch-all provision (s.5G(11)) applied to permit the Victorian *Confiscation Act* 1997 (Vic) to apply in a

⁶³ See Cheryl Saunders, “A New Direction for Intergovernmental Agreements” (2001) 12 *Public Law Review* 274 at 284 and Ian Govey and Hilary Manson, “Measures to Address Wakim and Hughes: How the Reference of Powers will Work” (2001) 12 *Public Law Review* 254 at 262.

⁶⁴ *DPP v Tat Sang Loo* (2002) 42 ACSR 459; (2002) 130 A Crim R 452; [2002] VSC 231.

context of a liquidation and he was prepared to grant a declaration to the State that property of a company in liquidation was available to satisfy a pecuniary penalty order. However, he rejected the arguments that s.5G(4) or (8) applied. He adopted a narrow view of s.5G(4) that would require the rolling-back only of those Commonwealth provisions which specifically prohibited the doing of the very act which the State law authorized. *Tat Sang Loo* is on appeal⁶⁵ and there is a Notice of Contention in relation to 5G(4).

36. Pt. 1.1A was also considered by Justice Barrett in 2003 in the Equity Division of the Supreme Court of New South Wales in *HIH Casualty and General Insurance Ltd (in liq) v Building Insurers' Guarantee Corp*⁶⁶ where he adopted a generous interpretation of ss.5G(4) and 5G(8) to uphold the validity of various State statutory “cut through” provisions which might enable statutory authorities to obtain the benefit of reinsurance held by HIH Casualty and General Insurance Ltd (in liq). He held that he would otherwise have held those “cut through” provisions to be directly inconsistent with the Corporations legislation. In particular, on the approach he adopted, he did not require under sub-s. (4) that the Corporations legislation make reference to the very type of act authorized by the State law: it was sufficient that there was a State law which authorized the particular act – if so, no provision of the Corporations legislation was to be read as prohibiting it.
37. Whether Ashley J. or Barrett J. is right about the operation of roll-back mechanism cannot yet be determined; what can be said about Pt 1.1A is this: first, it is likely that its operation will not be clarified until it receives a definitive interpretation by the High Court, and second, that it provides yet one more instance in the long history of

⁶⁵ The appeal was heard by the Victorian Court of Appeal (Winneke P, Charles and Callaway JJ A) on 15 and 16 March 2005.

s.51(xxxvii) where the legal consequences of a referral, or attempts to deal with those consequences, remain uncertain.
