The Referral of State Powers

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This article considers the history of the referral power under section 51(xxxvii) of the constitution and the problems to which the power can give rise.

THE Commonwealth constitution allocates enumerated heads of legislative power to the Commonwealth parliament. These are to be found for the most part in section 51. The legislative powers of the States under their constitutions are expressed in general terms. They may properly be described as plenary, except to the extent that the Commonwealth constitution has conferred exclusive power on the Commonwealth parliament to make laws on certain matters and save to the extent that the legislative power is effectively limited by the operation of section 109 of the constitution, which gives paramountcy to Commonwealth laws. They are also subject to express or implied limitations otherwise derived from the Commonwealth constitution.[1]

Like the Commonwealth constitution generally, the distribution of powers for which it provides may only formally be amended by the referendum process set out in section 128. The difficulty of securing the vote of a majority of electors in a majority of States is reflected in the high rejection rate of constitutional changes which have been proposed since federation. Of 42 Constitution Alteration Bills

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1. These derive from such provisions as the express guarantee of freedom of interstate trade (s 92), the prohibition against the States raising military forces or taxing Commonwealth property (s 114) or coining money (s 115) or discriminating against the residents of other States (s 117). To these may be added the implied freedom of political communication and the limits, derived from Ch 3 of the constitution on the functions which may be conferred on State courts: *Kable v DPP (NSW)* (1997) 189 CLR 51.

submitted to the electors since federation, only eight have secured the required majorities.

Informal, de facto and non-consensual change in the balance of power between the Commonwealth and States is open under the constitution. It has occurred historically through the use of what may loosely be described as ambulatory provisions. The word 'ambulatory' is used because these provisions are not in terms limited by reference to a particular subject matter. The first of them is section 96 which provides:

> During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

As Attorney-General Alfred Deakin predicted in 1902:

> The Federal Parliament ... having tasted the sweets of supremacy, will not consent to finance the local treasuries except for value received. If it provides money for the States it will exact tribute from them in some shape. As the power of the purse in Great Britain established by degrees the authority of the Commons, it will ultimately establish in Australia the authority of the Commonwealth. The rights of self-government of the States have been fondly supposed to be safeguarded by the Constitution. It left them legally free but financially bound to the chariot wheels of the central government.[2]

The history of the use of section 96 is too well known, at least in general terms, to bear repetition here.[3] The power it confers to impose terms and conditions upon financial grants to the States became a vessel which carried Commonwealth power to regulate various activities within the States well beyond the list of topics in section 51.[4] Also providing an ambulatory framework for power shifting is the authority conferred by section 51(xxix) to make laws for the peace, order and good government of the Commonwealth with respect to 'external affairs'.[5] The two

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2. G Winterton, HP Lee, A Glass & JA Thomson *Australian Federal Constitutional Law: Commentary and Materials* (Sydney: Law Book Co, 1999) 411-412, citing JA La Nauze (ed) *Federated Australia: Selections from Letters to the* Morning Post *1900-1910* (Melbourne: MUP, 1968) 97.
3. See CA Saunders 'The Development of the Commonwealth Spending Power' (1978) 11 MULR 369.
4. *Victoria v Commonwealth* (1926) 38 CLR 399 (the Federal Roads case); *Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735; *South Australia v Commonwealth* (1942) 65 CLR 373 (the First Uniform Tax case); *Victoria v Commonwealth* (1957) 99 CLR 575 (the Second Uniform Tax case); *A-G (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 557 (DOGS case).
5. The power extends to the implementation of treaties entered into between Australia and other countries even though their subject matter does not otherwise fall within the grant of legislative power under s 51: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 (racial

provisions mentioned embody very significant mechanisms for informal, non-consensual change in what some see as the essential arrangements embodied in the constitution at federation. There has been much complaint since 1901 about the way in which their construction by the High Court has enhanced and entrenched the dominance of the Commonwealth in the finances of the federation and, more broadly, in the distribution of law-making powers within it. Of course, it may be said from another perspective that the constitution is an instrument framed not just for the past but also for the future and that open-ended or ambulatory provisions which allow for such developments as have occurred are part of its essential nature. Nevertheless, with power shifting comes blame and responsibility shifting and debate about accountability. Co-operative arrangements between the States and the Commonwealth hold the promise of a more harmonious evolution of power sharing in the federal system albeit they are of a small 'c' constitutional nature which do not require formal change to the Commonwealth constitution. A co-operative mechanism of increasing importance is found in section 51(xxxvii) which authorises the Commonwealth parliament to make laws with respect to matters referred to it by the States. It is the use of the reference power as an instrument of co-operative constitutional evolution that is considered in this paper.

There are of course a variety of co-operative arrangements possible between the States and the Commonwealth. Co-operation may occur at an administrative level pursuant to delegation of functions from Commonwealth to State ministers. A recent example is the delegation by the Minister for Immigration and Multicultural and Indigenous Affairs of his functions under the Immigration (Guardianship of Children) Act 1946 (Cth) to State officials. It may occur under constitutionally sanctioned co-operative legislation. Under section 51(xxxviii) of the constitution the Commonwealth parliament may make laws with respect to:

> The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

This power was relied upon by the Commonwealth parliament to authorise States to make laws with respect to fisheries in Australian waters in the territorial sea beyond the low water mark.[6] Under the Offshore Constitutional Settlement Co-

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discrimination); *Commonwealth v Tasmania* (1983) 158 CLR 1 (Tasmanian Dam case) (environmental heritage protection); *Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v Commonwealth* (1989) 167 CLR 232.

6. Coastal Waters (State Powers) Act 1980 (Cth), upheld in *Port MacDonnell Professional Fishermens Association Inc v South Australia* (1989) 168 CLR 340. See also Coastal Waters (State Title) Act 1980 (Cth).

operative arrangements for the management of offshore resources such as fisheries and petroleum were entered into. The Fisheries Management Act 1991 (Cth) allows a fishery boat within and outside State coastal waters to be managed by one authority under one law (State or Commonwealth).

Co-operative schemes, without resort to section 51(xxxviii) or the reference power, may involve complementary legislation of both Commonwealth and States and the use of agencies exercising powers derived from both sources.[7] This may not be without difficulty as exemplified by the attempts to adopt uniform company legislation throughout Australia. Prior to the Commonwealth's unilateral attempt to comprehensively regulate the field, it was governed by a co-operative scheme involving uniform legislation in each State.[8] Such a scheme has its advantages although it is susceptible to the growth of 'disconformity' over time depending upon pressures brought to bear upon particular State legislatures. The attempt by the Commonwealth in 1989 to legislate comprehensively for trading and financial corporations and for their incorporation was found by the High Court in *New South Wales v The Commonwealth*[9] to exceed the power conferred on the Commonwealth by section 51(xx) of the constitution to make laws with respect to trading and financial corporations formed within the limits of the Commonwealth. Because of the word 'formed', which appears in the power, it was held not to extend to the formation of such corporations. The decision was later described by Kirby J in *Byrnes v The Queen*[10] as a 'narrow constitutional decision' which contributed to the 'grotesque complications that exist in the regulation of corporations under Australian law'.[11]

Following the decision in *New South Wales v The Commonwealth*, a new co-operative scheme was adopted reflecting heads of agreement signed by the Commonwealth and the States at Alice Springs on 29 June 1990. A Commonwealth Corporations Act was enacted as a law for the government of the Territory pursuant to section 122 of the constitution. Each State parliament then passed its own Corporations Act applying provisions of the Corporations Act 1989 (Cth) and the Australian Securities Commission Act 1989 (Cth) as laws of the State. Each State's Corporations Act conferred jurisdiction on the Federal Court with respect to civil matters arising under the Corporations Law and like jurisdiction was conferred by each State Act on the Supreme Court of the State and the Supreme Court of the Australian Capital Territory. The Commonwealth Corporations Act itself directly conferred jurisdiction on the Federal Court with respect to civil matters arising under the Corporations Law of the Australian Capital Territory. This scheme, which

7. *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535.
8. Eg, State Companies Acts 1961.
9. (1990) 169 CLR 482.
10. (1999) 164 ALR 520.
11. Ibid, 542.

was, in essence, a mirror legislation scheme, embodied another kind of co-operative arrangement, namely the cross-vesting of jurisdiction in State and federal courts.

The investing of federal jurisdiction in State courts – the so-called autochthonous expedient – is expressly contemplated by section 77(iii) of the constitution. However, the High Court held in *Re Wakim; Ex parte McNally*[12] that this long-standing co-operative mechanism is asymmetrical as the constitution does not authorise the investing in federal courts of jurisdiction arising under laws of the States. That is, of course, subject to the proposition that federal jurisdiction may incorporate as an element of the matter before the court claims arising under the laws of the States and under the common law.[13]

It was in *Re Wakim* that McHugh J observed: 'Co-operative federalism is not a constitutional term. It is a political slogan, not a criterion of constitutional validity or power'.[14] With respect to his Honour, it seems unduly dismissive to relegate the idea of co-operative federalism to the dustbin of political slogans. The constitution itself is the product of an historic exercise in co-operative endeavour by the pre-federation colonies that became the States. Whatever the perceived imbalance in the distribution of power that has emerged since that time, it provides a framework which requires a degree of co-operation if it is not to be unworkable. That is not a proposition about the temporary imperative to co-operation imposed by the need for Australia to function effectively in a complex and competitive global environment. It is a more basic proposition about the nature of the constitution itself. From one perspective it is trite. And it may have a role in the interpretation of the constitution and, relevantly for present purposes, of the referral power. For where the words of the constitution present constructional choices consistent with fundamental principles of representative democracy and separation of powers and the like that are embedded in it, it is difficult to see why those choices, which make co-operative arrangements between Commonwealth and States possible, should not be preferred to those which do not. It is arguable that such an approach to constitutiional construction would have allowed State parliaments to confer jurisdiction arising under State laws on federal courts, subject to the consent of the Commonwealth parliament and was to be preferred to the choice which prevailed and which led to the failure of the cross-vesting scheme. In *Gould v Brown*[15] the High Court had divided equally on the question. Even after *Re Wakim,* which turned on Chapter 3 issues, there is still room for debate about the existence and content of a norm of construction which would support co-operative arrangements.

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12. (1999) 198 CLR 511.
13. *Fencott v Muller* (1983) 152 CLR 570, 608; *Stack v Coast Securities (No 9) Pty Ltd* (1984) 154 CLR 261, 294-295; *PCS Operations Pty Ltd v Maritime Union of Australia* (1998) 153 ALR 520, 524-525.
14. *Re Wakim* above n 12, 556.
15. (1990) 193 CLR 346.

The constitutional difficulties which led to the invalidation of the cross-vesting of jurisdiction under the co-operative corporations law scheme were compounded by a restrictive approach to the construction of laws made under the scheme in so far as they conferred functions under State law upon the Commonwealth Director of Public Prosecutions and the Australian Securities and Investments Commission.[16] These difficulties, however, raise questions of statutory rather than constitutional interpretation and so have a less intractable quality about them.

Against that general background it is of interest to consider the provisions of the constitution which allow for the referral of legislative powers by the States to the Commonwealth.

THE HISTORY OF THE REFERRAL POWER

The referral power is to be found in section 51(xxxvii), which is in the following terms:

> 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:
> ...
> (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.

Predecessors of this provision may be found in the recommendations of a Committee of the Privy Council which inquired into the constitutional position of the Australian colonies in 1849 and recommended the establishment of a General Federal Assembly. The Committee recommended that the powers of the Assembly include:

> 9. The enactment of laws affecting all the colonies represented in the General Assembly on any subject not specifically mentioned in this list, and on which it should be desired to legislate by addresses presented to it from the legislatures of all the colonies.

A similar proposal for referral of residual powers from the colonies was recommended by Wentworth's Constitutional Committee of 1853. And the Select Committee which drafted the Victorian Constitution recommended, in a report of

16. *Byrnes v R* (1999) 199 CLR 1; *Bond v R* (2000) 201 CLR 213; *R v Hughes* (2000) 202 CLR 535; *Macleod v Australian Securities and Investments Commission* (2002) 191 ALR 543. See also A De Costa 'The Corporations Law and Co-operative Federalism After *The Queen v Hughes*' (2000) 22 Syd LR 451; J McConvill & D Smith 'Interpretation and Co-operative Federalism: *Bond v R* from a Constitutional Perspective (2001) 29 FL Rev 75.

9 December 1853, the occasional convocation of a General Australian Assembly to legislate on any questions of vital inter-colonial interest that were submitted by the Act of any legislature of one of the Australian colonies. The draft bill prepared by Wentworth in 1857 for the creation of an Australian Federal Assembly provided that it should have power to deal with specified subjects 'and any other matter which might be submitted to it by the legislatures of the colonies represented therein'.

The Federal Council of Australasia established by the Federal Council Act 1885[17] was to be given authority, at the request of the legislatures of two or more of the colonies represented on it, to make laws concerning:

> (h) Any matter which at the request of the legislatures of the colonies Her Majesty by Order in Council shall think it fit to refer to the Council:
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> (i) Such of the following matters as may be referred to the Council by the legislatures of any two or more colonies, that is to say – general defences, quarantine, patents of invention and discovery, copyright, bills of exchange and promissory notes, uniformity of weights and measures, recognition in other colonies of any marriage or divorce duly solemnised or decreed in any colony, naturalisation of aliens, status of corporations and joint stock companies in other colonies than that in which they have been constituted, and 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: provided that in such cases the Acts of the Council shall extend only to the colonies by whose legislatures the matters shall have been so referred to it, and such other colonies as may afterwards adopt the same.[18]

In the event the Federal Council failed. New South Wales and New Zealand did not attend any of its meetings. Fiji, which was a member, came to one and South Australia only participated between 1889 and 1891. Its authority was limited, it had no executive and no revenue and was branded as a Victorian invention foisted on the other colonies.[19]

The General Assembly proposal and the Federal Council did not themselves involve the creation of a federation. Nevertheless, the notion of referral of powers on a consensual basis to a central legislating authority persisted and found its expression in section 51(xxxvii).

Substantive debate about the referral clause occurred at the third session of the Federal Convention held in Melbourne in 1898. Its form then was much as it is now, although it was verbally amended to its present form later in the session.

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17. 48 & 49 Vic c 60.
18. See generally J Quick & RR Garran *The Annotated Constitution of the Australian Commonwealth* (Sydney: Legal Books, 1976) 648-649.
19. R Sharwood 'The Australasian Federation Conference of 1890' in G Craven (ed) *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (Sydney: Legal Books, 1986) vol 6, 41-42.

Deakin acknowledged the ancestry of the clause in section 15 of the Federal Council Act 1885. He expressed a concern that if allowed to remain in what he called its 'present restricted form' it would be altogether unsuitable to the differing conditions of the Federal parliament. In particular, if something less than all the States referred power he was concerned there might not be power to authorise expenditure or the raising of money by taxation which might be necessary for the exercise of the referred power. He also put forward the view that the laws made under this provision would not be 'in the strict sense of the term, federal laws'.[20] This, however, reflected a concern that they would not be laws which applied to the whole of the federation if made pursuant to a referral by some but not all of the States.

Deakin was also concerned about the possibility of revocation of a referred power:

> 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 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. It appears to me that this sub-section, which is certainly one of the very valuable sub-sections of this clause, affording, as it does, means by which the colonies may by common agreement bring about federal action, without amending the Constitution, needs to be rendered more explicit.[21]

Doctor Quick recognised the possibility that the referral of power could effect de facto constitutional change. His principal objection to it was 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.[22]

Isaacs and others took a longer view:

> In the course of the existence of the Commonwealth questions may arise that we do not foresee, and without any amendment of the Constitution the States may if they choose refer them to the federal power.[23]

He was of the view that there was no power of revocation:

> With regard to the other point that a State may repeal a law, I do not agree with that argument. If a State refers a matter to the Federal Parliament, after the Federal

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20. La Nauze above n 2.
21. Ibid, 217.
22. Constitutional Debates, 218 vol IV.
23. Constitutional Debates, 222 vol IV.

> Parliament has exercised its power to deal with that matter, the State ceases to be able to interfere in regard to it.[24]

O'Connor observed that a law once passed under this provision would become a federal law. Isaacs replied: 'Yes, and nothing less than the federal authority can get rid of it'.[25]

THE APPLICATION OF THE REFERRAL POWER

Since federation there have been a number of references of power pursuant to section 51(xxxvii) although it has come into greater prominence more recently not least because of the post-*Wakim* referrals in relation to corporations law and recent referrals with respect to threats to national security.[26] Referral Acts from the various States have covered, inter alia, meat inspection, State banking, poultry processing and air navigation. In the area of family law, the artificiality of constitutionally derived distinctions based upon the reservation to State legislatures of powers in relation to child custody, guardianship, access and maintenance was overcome by all States except Western Australia referring power over those issues to the Commonwealth.[27] Western Australia being the only State to set up a Family Court under State law was able to take advantage of the autochthonous expedient so that its Court has always been able to exercise both federal and State jurisdiction. Jurisdictional issues with respect to property disputes remain. There has been no referral of power in that respect.[28]

An important application of the referral power is the mutual recognition scheme. This was an interesting model of consensus building leading to an important co-operative referral. In 1991, a process of national consultation was promoted by a Commonwealth-State committee on regulatory reform which was set up after the State Premiers Conference in 1990. A discussion paper was released and seminars were held in each capital city. The discussion paper[29] identified the possibility that Australia might have more barriers to trade in goods and services between States

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24. Ibid, 223.
25. Ibid.
26. For a complete list of referrals up till 2001, see G Aitken & R Orr *The Australian Constitution* 3rd edn (Canberra: AGS, 2002) 218-220.
27. This was recommended by the Joint Select Committee on the Family Law Act 1980 and effected by the following State legislation: Commonwealth Powers (Family Law – Children) Act 1986 (NSW); Commonwealth Powers (Family Law – Children) Act 1986 (Vic); Commonwealth Powers (Family Law – Children) Act 1990 (Qld); Commonwealth Powers (Family Law) Act 1986 (SA); and Commonwealth Powers (Family Law) Act 1987 (Tas).
28. J Crawford *Australian Courts of Law* 3rd edn (Melbourne: OUP, 1993) 224-226.
29. Comonwealth-State Committee on Regulatory Reform *The Mutual Recognition of Standards and Regulations in Australia* Discussion Paper (Canberra, 1991).

and Territories than would exist between the member nations of the European Community. Freedom in interstate trade and mobility of labour and capital would not be achieved if regulatory environments across States and Territories permitted that prospect to eventuate. The discussion paper observed:

> Mutual recognition of standards and regulations by all States and Territories has the potential to achieve these objectives. Mutual recognition allows all regulations throughout Australia to co-exist while reducing the current adverse impacts of those regulatory differences.[30]

The Premiers and Chief Ministers met in November 1991 and a formal agreement was signed on behalf of the Commonwealth, the States and the Territories on 11 May 1992. The Mutual Recognition Act 1992 (Cth) was passed as a law of the Commonwealth following referrals of power by the parliaments of New South Wales and Queensland. Each of these referrals was for a fixed period. The matters referred were defined in the referring Acts in terms of 'the enactment of an Act in the terms or substantially the terms set out in the Schedule'. In each case the proposed Mutual Recognition Bill 1992 (Cth) was scheduled to the State Referring Act. The law passed by the Commonwealth parliament under that referral was adopted by the other States and Territories and last, with historical consistency, by Western Australia. In Western Australia the adoption was effected by section 4(1) of the Mutual Recognition (Western Australia) Act 1995 (WA). It was limited to the original Commonwealth Act and any amendments made to it before the State Act received royal assent. The Commonwealth Act is scheduled to the State Act. The State Act also provided that the adoption was to cease at a specified date, defined as 28 February 1998 or such earlier date as might be fixed by proclamation. The State law has subsequently been extended and the adoption of the Commonwealth Act continues in force in Western Australia.[31]

The most important use of the referral power in recent history is that which supported the introduction of the new corporations scheme. It is not necessary for present purposes to refer to the convoluted negotiations and game playing that went on prior to its adoption.[32] Under the new scheme each State has referred the text of the Corporations Bill 2001 and the Australian Securities and Investments Commission Bill 2001 to the Commonwealth as the referred 'matter' to the extent to

30. Ibid, 2.
31. See generally, M Bini 'Mutual Recognition and the Reference Power' (1998) 72 ALJ 696; EJ Wright 'Mutual Recognition and the National Market for Goods' (1993) 78 ABLR 270; Carroll 'Mutual Recognition: Origins and Implementation' (1995) 54 AJPA 35; T Thomas & C Saunders (eds) *The Australian Mutual Recognition Scheme: A New Approach to an Old Problem* (Melbourne: Centre for Comparative Constitutional Studies, 1995).
32. MJ Whincop 'The National Scheme for Corporations and the Referral of Powers: A Sceptical View' (2001) 12 PLR 263.

which they deal with matters within the legislative powers of the States. Each State has also referred:

> The formation of corporations, corporate regulation and the regulation of financial products and services ... to the extent of the making of laws with respect to those matters by making express amendments of the corporations legislation.

The latter reference has effect only to the extent that the matter is not already a subject of Commonwealth power. There is a five-year sunset clause for each reference. The references may also be terminated earlier by proclamation of the Governor in Council. In some cases the amendment reference can be terminated separately.

Following the references, the Commonwealth parliament, relying upon section 51(xxxvii), enacted the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth). The Commonwealth and the States have also reached an agreement which involves undertakings about the use of the referred matters, specifies procedures for the alteration of the statutes and for termination of the references and requires that the operation of the scheme be reviewed every three years.[33] A powerful impetus to the formation of the scheme was the referral agreement made by Victoria and New South Wales directly with the Commonwealth. That agreement left the other States with little option but to go along with referral. Queensland did so. Western Australia joined in following a change of government in that State. South Australia and Tasmania also joined after the Commonwealth agreed to consider an amendment to the reference limiting the degree to which the power could be used to require persons to incorporate.[34]

More recently, various of the States have referred power to the Commonwealth to make laws with respect to terrorism. In Western Australia referral is effected by the Terrorism (Commonwealth Powers) Act 2002 (WA) which, although assented to on 14 January 2003, has not yet been fully proclaimed. The Act is in substance a text reference although there is a subject matter flavour about it which may raise interesting questions if the application, in Western Australia, of laws made under the reference ever arises for judicial consideration. The text of what are called the 'referred provisions' is set out in Schedule 1 to the Act. It comprises a new Part 5.3 of the Commonwealth Criminal Code. The operative provision of the referring Act is section 4. It refers:

> (a) the matters to which the referred provisions relate, but only to the extent of the making of laws with respect to those matters by including the referred

33. For a more detailed description and discussion see CA Saunders 'A New Direction for Intergovernmental Arrangements' (2001) 12 PLR 274. For a South Australian perspective, see Selway '*Hughes*' Case and the Referral of Powers' (2001) 12 PLR 288.
34. Selway ibid, 300.

provisions in the Commonwealth Criminal Code in the terms, or substantially in the terms, of the text set out in Schedule 1; and

(b) the matter of terrorist acts, and actions relating to terrorist acts, but only to the extent of the making of laws with respect to that matter by making express amendments to the terrorism legislation or the criminal responsibility legislation.

The reference is fixed in time and is also subject to termination by the Governor by proclamation (section 5).

THE FUTURE OF THE REFERRAL POWER

In a paper delivered in Perth to the Australian Association of Constitutional Law in May 2002, the Commonwealth Attorney-General, Mr Daryl Williams QC, no doubt encouraged by the outcome of the Corporations Law scheme, indicated that serious consideration was being given to references as a simpler and more certain approach to co-operative federalism.[35] He mentioned in particular the area of de facto property. He noted that all States except Western Australia have already referred powers with respect to the children of de facto couples to the Commonwealth, but that without further references de facto property issues will remain outside the Commonwealth's jurisdiction. He also referred to an agreement with the States about the reference, which has since eventuated, to enable the Commonwealth to deal more effectively with national security threats. While the Commonwealth had introduced a package of specific counter-terrorism legislation, co-ordinated action by all Australian governments was, in his opinion, clearly required. He accepted that what he called 'the patchwork' of existing constitutional powers the Commonwealth could call upon would be complex and their limits unclear. Any legal complexity or uncertainty could become a focus for litigation about the effectiveness of new federal terrorism offences. Suitable State references would avoid these kinds of problems by providing clear support for comprehensive terrorism offences of national application. The Attorney identified the areas of corporations, de facto property and national security as confirming the utility of references and demonstrating that Australian governments are willing to co-operate in order to advance the national interest. He acknowledged a natural degree of reluctance about references but indicated that States could take comfort in the fact that there are a range of safeguards which militate against their misuse by the Commonwealth. The ultimate sanction available to States would be to revoke a reference.

35. D Williams 'Making Federalism Work: A New Frame of Reference' *Australian Association of Constitutional Law Seminar* (Perth, 22 May 2002).

CONSTRUCTIONAL ISSUES

As appears from the Convention Debates and from subsequent case-law and discussion of the referral power, there are a number of unresolved issues about its operation. Some of these issues may offer the sorts of constructional choices which may be determined according to a strict or broad interpretation informed to a lesser or greater degree by the proposition that the constitution does contemplate something which can sensibly be called 'co-operative federalism'.

At the outset it may be observed that the power is not, in express terms, a power to refer matters. It is a power conferred upon the Commonwealth parliament to make laws with respect to matters referred. This has the important consequence that the laws so made are federal laws. The legislative power conferred by section 51(xxxvii) is subject to the constitution. So constitutional prohibitions will operate with respect to it. Being federal laws, laws made pursuant to section 51(xxxvii) attract the operation of section 109 in respect of inconsistent State laws. It is noteworthy that the Corporations Law 2001 (Cth) seeks to overcome the risks of inadvertent inconsistency by expressly denying any intention 'to exclude or limit the concurrent operation of any law of a State'.[36] Under section 5F the States may exclude the operation of the Corporations Law in relation to a matter in whole or in part. This is subject to the Commonwealth by regulation countering that exclusion. There are also rollback provisions in sections 5G and 5I.

A question has been raised in academic commentary about whether a law adopted by a State parliament pursuant to section 51(xxxvii) is also a Commonwealth law.[37] The power conferred by section 51(xxxvii) is qualified so as to limit the operation of a law made under it to the referring States and to any States adopting that law. With respect to the contrary view, it is difficult to see how the language of the section could contemplate a law made pursuant to section 51(xxxvii) somehow changing its character from federal to State depending upon whether it applied to a referring or an adopting State.

Section 51(xxxvii) does not expressly confer power upon the States to refer matters or adopt laws made under it. Nor does it specify the mechanism by which State parliaments shall refer matters to the Commonwealth parliament or adopt laws made under the referral power. The practice has been to effect such referrals and adoptions by Acts of the State parliaments. The source of the power to refer is to be found either in the State constitutions or, by implication, from the Commonwealth constitution. This precise question has not fallen for determination. However, it certainly seems at least plausible that the power to refer or adopt is a power conferred

36. S 5E.
37. JA Thomson 'Adopting Commonwealth Laws: Section 51(xxxvii) of the Australian Constitution' (1993) 4 PLR 153.

upon the parliaments of the various States, as an implied power by the Commonwealth constitution. Alternatively, it may be that the implication operates upon the constitution of each State by a reading together of section 51(xxxvii) and section 106 of the constitution.

What may be referred is a 'matter'. In his recent address in Perth in May 2002 the Commonwealth Attorney-General said:

> Two types of reference are possible: 'subject matter' and 'text' references. An example of the former was reference of the matter of 'air transport' by Queensland to the Commonwealth in 1943 and 1950. The mutual recognition scheme and the corporations law schemes were both examples of 'text' references subject to the amendments reference in the later scheme.[38]

The scope of the 'matters referred' in section 51(xxxvii) was discussed in *R v Public Vehicles Licensing Appeal Tribunal (Tasmania); Ex parte Australian National Airways Pty Ltd.*[39] There it was held that the Commonwealth Powers (Air Transport) Act 1952 (Tas) was a valid reference by the parliament of the State of Tasmania to the Commonwealth parliament of a 'matter' under section 51(xxxvii). The High Court said:

> One contention which can be disposed of at once is that under s 51(xxxvii) the power to be referred by a State or States must be simply a power to enact a law in the form of a statute which is described and defined just as an act of Parliament would be. This argument is apparently derived from the words at the end of paragraph (xxxvii) 'which afterwards adopt the law'. From that it is inferred that the matter referred to the Parliament of the Commonwealth by the Parliament of a State must be the law. This seems to be an entirely erroneous inference without foundation. The law referred to by the last word goes back to the initial words of section 51 – 'the Parliament shall ... have power to make laws for the peace, order and good government of the Commonwealth' and refers to the law made by the Parliament of the Commonwealth in pursuance of a reference of a matter. 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.[40]

It may be inferred from that passage that the Court would have little difficulty in upholding the validity of text references notwithstanding the use of the word 'matters' in placitum xxxvii. If the power were limited to matters referred in terms of defined subjects of legislation only, the political and historical realities of the Australian federation would result in the reference power being invoked with about the same frequency as constitutional referenda succeed. The text reference mechanism provides safeguards for the States who are not, by their reference,

38. Williams above n 35.
39. (1964) 113 CLR 207.
40. Ibid, 224-225.

giving the Commonwealth carte blanche to make laws on any aspect of the subject matter referred.

There is an important open question as to whether a reference unlimited in time is irrevocable.[41] However, there is little controversy that a referral may be for a fixed period.[42] The uncertainty as to whether a reference unlimited in time is revocable will no doubt have the consequence that for the foreseeable future most, if not all, references will contain a sunset clause.

An interesting question arises about what 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. 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. In this respect the position of referring States and adopting States is arguably different. The latter case would depend upon whether the reference in placitum xxxvii to States whose parliaments 'afterwards adopt the law' provides for extension of the law to those States only during the currency of the adoption or once and for all after adoption. This would not be a practical problem where referral or adoption involving sunset clauses also provide for self-terminating provisions in the laws made pursuant to the referral. Apparently, however, this is not the case with the Corporations Law.

There is a related question about the basis upon which a law made under a referral may be amended. Where the referral is of a subject matter rather than a precise text then, so long as the referral subsists, there would seem to be little doubt that the Commonwealth could amend laws made pursuant to it provided the amendment did not take the laws outside the scope of the subject matter. The effect of amendment upon the law and States which had adopted the original law rather than referred the subject matter is questionable.

If the Commonwealth were to repeal a law made under a referral the law would also cease to have effect in those States which had adopted it. Amendment of a referred law would require adoption by non-referring States, either of the amendment or of the law as amended if it were to continue to have effect in those States. Absent such adoption, it is arguable that the original unamended version of the law would cease to have effect in non-referring States.

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41. *Graham v Paterson* (1950) 81 CLR 1, Webb J 25; *Airlines of NSW v New South Wales* (1964) 113 CLR 1, 53; *R v Public Vehicles Licensing Appeal Tribunal* (1964) 113 CLR 207, 226; *Sande v Registrar, Supreme Court (Qld)* (1996) 64 FCR 123, Lockhart J 131.
42. *Airlines of NSW* ibid, Taylor J 38, Kitto J agreeing 30, Windeyer J 53. See also R Anderson 'Reference of Powers by the States to the Commonwealth' (1951) 2 UWAL Rev 1, 7-8; RD Lumb & GA Moens *The Constitution of the Commonwealth of Australia Annotated* 5th edn (Sydney: Butterworths, 1995) 283; cf WA Wynes *Legislative, Executive and Judicial Powers in Australia* 5th edn (Sydney: Law Book Co, 1976) 171.

A mechanism by which referring or adopting States may deter the Commonwealth from non-consensual amendment would be to make the referral or adoption subject to a condition that it would be revoked in the event that the law were amended otherwise than in accordance with some agreed mechanism for obtaining consensus. Even then the question remains about the operation of the original version of the Commonwealth law if the referral or adoption is revoked.

The language of the referral power leaves open the possibility that a Commonwealth law made under it may have application to one or more, but not necessarily all, States of Australia. This possibility does not seem to have been prominent in the consideration of the power during the Convention debates. The spectacle of a kind of Swiss cheese Commonwealth law is not particularly edifying but is plainly open and indeed is a reality under certain of the limited referrals already in place. At one point it was a possibility that a Commonwealth Corporations Law would be enacted which would operate only in certain States. It is difficult enough in a federation to have to deal with State laws which change from one border to the next. The Balkanisation of Commonwealth laws should not lightly be accepted. There is a strong argument against the exercise of the power in relation to anything less than a universal referral. That does not mean conferring a veto on idiosyncratic State governments. It requires, however, a recognition that uniformity is a priority goal where the laws of the Commonwealth are concerned.

There are no doubt more unanswered questions in relation to the operation of the referral power. It may be doubted whether many or any of these questions will ever reach the High Court. For it seems to be, and is likely to continue to be, the case that the States and Commonwealth will proceed according to agreements made with all elements of the Australian federation and that sufficient protective mechanisms will be built into those agreements and the subsequent referrals and adoptions to deter unilateral Commonwealth exploitation of the power. The development of these practical safeguards, whilst it may reflect a degree of distrust of Commonwealth powers by the States, may also provide a useful device which will allow the evolution of the referral powers as a mechanism for the positive development of co-operative federalism in Australia.