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The Fair Work Act and the Referrals Power –
Keeping the States in the Game

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This article discusses the recent referrals by five of the Australian States so as to extend the coverage of the Commonwealth's Fair Work Act 2009 (Cth) as a national industrial relations system beyond the limits imposed by the latter's existing constitutional powers. In so doing it highlights the governance arrangements underpinning the referral and the continued opportunity for participation that the States, as well as the Territories, enjoy in this area. The extent of the specific referrals is discussed, with differences between co-operating States noted. This analysis is situated in the context of interpretation of the constitutional power with respect to referrals in s 51(xxxvii) of the Constitution more generally and lingering ambiguities as to that power.

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I Introduction

The *Fair Work Act 2009* (Cth) was passed by the Rudd government as a replacement of its predecessors' controversial Work Choices scheme which had seen the Commonwealth employ its legislative power with respect to constitutional corporations under s 51(xx) of the Constitution to establish a national industrial relations system, displacing over a century's dominance by the States in this area. Although the present government was elected in large part on a promise to 'scrap Work Choices', it was obvious that in doing so it was not also going to retreat from the vista which the Coalition government had opened up – and which a majority of the High Court had confirmed was there for the claiming.¹ Despite the demise of the substance of the Work Choices regime, the establishment of a national system directly determining working conditions in this country will be an enduring legacy of the Howard government.

Over the course of 2009, the Rudd government cemented the foundations of the Commonwealth's continuing central role in industrial relations by negotiating successfully with all but one of the six States for the constitutional referral of their legislative powers on this topic. In so doing, the incomplete coverage of the earlier Work Choices law has been substantially narrowed under its replacement. While securing the States' cooperation so as to extend the national scheme in this way is in itself, a significant achievement, it does invite attention to the rather enigmatic constitutional mechanism of referral – both in this particular context and more generally.

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¹ *New South Wales v Commonwealth* (2006) 229 CLR 1.

This article aims to squarely consider the operation of s 51(xxxvii) as a tool of co-operative federalism used in support of the Fair Work system. In so doing, several of the more ambiguous elements of the power which have been discussed in secondary commentary or received consideration from some members of the High Court in the 2007 case of *Thomas v Mowbray*² ('*Thomas*') are revisited for the purpose of contrasting legislative approaches to the core challenge of ensuring some level of ongoing State control over Commonwealth use of their reference. Of course when the States refer a matter to the Commonwealth so that it may enact laws upon it, this necessarily involves a handover from the former that empowers the latter. But if the referral mechanism is, in the words of Chief Justice French, 'an instrument of co-operative constitutional evolution',³ then there is no reason to think of it as crudely inimical to continued State participation, and certainly not where that is geared towards preserving the integrity of its initial reference in the face of possible Commonwealth exploitation of the same. In short, there is every reason to approach the power as one which has distinct characteristics of federal co-operation at its core and which should affect the terms of intergovernmental schemes which rely upon it and also its judicial interpretation.

In analysing the 2009 referrals from the States and their effect on the Commonwealth's *Fair Work Act*, this article simultaneously explores the more general complexity of s 51(xxxvii) which both its text and recent renaissance in support of other major national schemes tend to downplay.

II The *Work Choices* Legacy – an incomplete national industrial relations system

Inevitably, this discussion begins with the *Work Choices* legislation of the Commonwealth government under Prime Minister John Howard.⁴ As is well-known, that law saw a bold use of the Commonwealth's legislative power with respect to so-called 'constitutional corporations' under s 51(xx) of the Commonwealth Constitution to support a national industrial relations system regulating the minimum conditions of workers within its purview and facilitating a far-reaching extension of the use of negotiated individual workplace agreements.⁵ In escaping the procedural and jurisdictional constraints of the conciliation and arbitration power in s 51(xxxv) of the Commonwealth Constitution, the power underpinning federal industrial law for over a century, the Howard government effectively revolutionised the labour law of Australia. The 2006 challenge by all State governments to the validity of the reliance of the *Work Choices* legislation upon the corporations power of resulted in their comprehensive defeat and the validity of the scheme being upheld.⁶

² (2007) 233 CLR 307.

³ R S French, 'The Referral of State Power' (2003) 31 *UWALRev* 19 at 21.

⁴ Workplace Relations Amendment (Work Choices) Act 2005.

⁵ For relevant pre-history to the *Work Choices* Act see A Stewart and G Williams, *Work Choices – What the High Court Said*, Federation Press, Annandale NSW, 2007, p 26-31.

⁶ *New South Wales v Commonwealth* (2006) 229 CLR 1.

However, despite the insinuation of corporate structures throughout modern life, the corporations power had obvious limitations as the bedrock of an industrial relations system. This is not simply because there are many individuals who are employed by unincorporated bodies, but also because of uncertainty about which corporate structures fall within the ambit of s 51(xx). The power is expressed as applying only to the topic of ‘foreign corporations; and trading and financial corporations formed within the limits of the Commonwealth’. While the first category is self-evident, on present High Court authority, one determines the character of domestic corporations through examining whether trade or finance amounts to a ‘substantial’ part of their overall activities.⁷ As the Explanatory Memorandum which accompanied the Fair Work Amendment (State Referrals and other Measures) Bill stated, this can present difficulties when a corporate structure lacks a clear commercial focus, particularly those in the charitable or community services sector.⁸ The inherent instability of using ‘activities’ as the means of determining which companies are covered and which are not is generally worrying. As Rosemary Owens says, ‘a change in factual circumstances may alter the corporation’s classification’ and the possibility that they can ‘move in and out of coverage by the regulatory system is most unsatisfactory, yet Commonwealth legislation cannot prevent it’.⁹

The incomplete reach of the Commonwealth’s corporations power may be partially made up by the use of other grants of legislative power.¹⁰ The referral power of s 51(xxxvii) was, in the case of Victorian workers, already part of this supplementary bank upon which the Commonwealth could rely in order to extend coverage of its industrial relations system, due to that State having referred legislative power over private sector workers to the Commonwealth in 1996.¹¹ Even with this assemblage of powers, gaps inevitably remained. The Australian Bureau of Statistics calculated that nationally only 80.5% of all non-managerial private sector employees fell under the Commonwealth’s scheme in 2008.¹² By contrast, 1.6% were covered exclusively by State schemes and for a significant 17.9% it was actually unclear which jurisdiction had power to determine their conditions.¹³

In other words, despite the rhetoric proclaiming *Work Choices* as a national scheme, its coverage was incomplete and real problems existed of inconsistency and duplication with State systems outside of Victoria and the two Territories. The Business Council of Australia complained about the costs of such regulatory overlap to business productivity

⁷ *R v Federal Court of Australia; Ex parte WA National Football League (Adamson’s Case)* (1979) 143 CLR 190.

⁸ Explanatory Memorandum to the Fair Work Amendment (State Referrals and Other Measures) Bill 2009. As Owens discusses, two cases in 2008 illustrated this uncertainty very clearly: R Owens, ‘Unfinished Constitutional Business: Building a National System to Regulate Work’ (2009) 22 *AJLL* 258 at 266-72.

⁹ *Ibid.*, 274.

¹⁰ Namely, s 51(i), the power with respect to overseas and interstate trade and commerce (see *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397 and Fair Work Act 2009 (Cth), s 14(1)(d)); and s 122, the power with respect to the Territories.

¹¹ Workplace Relations Act 1996 (Vic).

¹² Explanatory Memorandum, above n 8, v.

¹³ *Ibid.*

and competitiveness,¹⁴ while Professor Andrew Stewart highlighted the cost likely to be incurred by entities (especially not-for-profits) in trying to clarify with which system they must comply.¹⁵ The Commonwealth government, in ushering in the *Fair Work Act* stressed the cost to taxpayers in maintaining separate State systems alongside a Commonwealth one which covers 80% of workers.¹⁶ Lastly, Professor George Williams, in the final report of his 2007 inquiry for the New South Wales government into *Options for a New National Industrial Relations System* highlighted the ways in which the inadequate Commonwealth coverage resulted in real disparities between certain types of industry depending on the prevalence of incorporation and consequential discrepancies in Commonwealth coverage between metropolitan versus regional areas; and male versus female employees.¹⁷

III The 2007 Williams Report – options for a co-operative solution

The Williams report has been most influential on the way in which the *Fair Work Act* has been rolled out as an attempt to extend the coverage of a Commonwealth national industrial relations scheme. New South Wales, anticipating a change of government in Canberra and the demise of Work Choices, wanted to initiate consideration of how the governments of Australia might move forward. Following the High Court's determination as to the utility of the corporations power to sustain a national, albeit incomplete, system, there was obviously no question of a Commonwealth retreat in the area. On the other side of the ledger, the States' resistance to Work Choices made it very unlikely that they would now willingly choose to let their own industrial relations schemes 'wither away' as the Commonwealth Coalition government had once expressed its hope.¹⁸ And yet the problem of inadequate coverage required a solution.

Williams was asked to produce a range of options for achieving a harmonised national industrial relations system within a framework of co-operative federalism. The chief rationale for approaching the problem in this way was the Commonwealth's inability to proceed alone, but also the many 'compelling reasons why there should be ongoing State involvement in any future industrial relations system'.¹⁹ Williams highlighted not just the States' constitutional status within the federation and their need to be responsive in policy areas affected by workplace conditions and capacity – namely their local economies and delivery of services, but also the fact they are major employers in their own right, their history of past innovation on industrial relations matters, and especially their experience with small and medium-sized employers.²⁰ Significantly, Williams also suggested giving all jurisdictions a stake in the national scheme would curb 'ideological policy extremes' when power changed hands in Canberra.²¹ All those factors are indeed noteworthy, but it

¹⁴ G Williams, *Working Together – Inquiry into Options for a New National Industrial Relations System* (Final Report), State Government of New South Wales, 2007, p 72.

¹⁵ *Ibid*, 24.

¹⁶ Explanatory Memorandum, above n 8, vii.

¹⁷ Williams, above n 14, p 19.

¹⁸ The Hon Tony Abbott quoted in Williams, above n 14, p 12.

¹⁹ *Ibid*, p 33.

²⁰ *Ibid*, p 33-35.

²¹ *Ibid*, p 35.

is worth acknowledging at the outset that they complicate rather than ease the path through which a truly national scheme may be brought about because they negate against a wholesale handover of power by the States. Somehow they must be kept *meaningfully* in the game.

After a useful survey of various existing co-operative structures, Williams narrowed down two mechanisms for State involvement in the construction of what he called the ‘optimum model’ for co-operation in this field.²² Those were either the referral of power by the States to the Commonwealth under s 51(xxxvii) of the Constitution or the enactment of uniform or ‘mirror’ legislation through the adoption by participating States of the Commonwealth’s scheme enacted in one of the Territories.²³ Neither approach is unfamiliar, but referral was ultimately preferred over the State adoption of Commonwealth template legislation despite the latter clearly giving the States rather more scope for ongoing control. The reason for this is the consideration which has driven the renaissance of s 51(xxxvii) more generally in the last decade – the difficulty of involving the federal judiciary in enforcement of a scheme resting only on uniform laws after the decision by the High Court in *Re Wakim; ex parte McNally*²⁴ and further doubt cast upon the validity of States investing Commonwealth officials with duties and powers in *R v Hughes*.²⁵ The negative constitutional implication discovered by the Court in *Wakim* so as to prevent the States vesting the federal judiciary with jurisdiction over matters arising under their mirror legislation would lead to, in Williams’ assessment, ‘extra cost, inconvenience and inconsistencies in the judicial application of the law’.²⁶ Consequently, although he did not reject this mechanism for the construction of national scheme, he suggested it would be only a short term option until such time as a constitutional amendment could overturn the result in *Wakim* and allow cross-vesting and co-operative exchange of government functions more generally.²⁷ Use of the referral mechanism on the other hand would enable jurisdiction to be vested in both federal and State courts for the enforcement of the scheme – depending on the specific preferences of the various States.²⁸

It is very clear from the Explanatory Memorandum accompanying the *Fair Work Act* (State Referrals) Bill that the Commonwealth had little enthusiasm for any path other than referral, for reasons well beyond the issue of judicial enforcement. Describing harmonisation of Commonwealth and State laws through mirror legislation as ‘sub-optimal’,²⁹ it insisted that this would not substantially alleviate jurisdictional uncertainty nor would it remove the need for the states to maintain significant workplace relations infrastructure of their own at a cost to their taxpayers. It is perhaps unsurprising that the

²² Ibid, p 89.

²³ Ibid, p 91.

²⁴ (1999) 198 CLR 511.

²⁵ (2000) 202 CLR 535.

²⁶ Williams, above n 14, p 93.

²⁷ Ibid. See further, G Williams, ‘Co-operative Federalism and the Revival of the Corporations Law: *Wakim* and Beyond’ (2002) 20 *C&SLJ* 160.

²⁸ See *Fair Work Act* 2009 (Cth), s 12.

²⁹ Explanatory Memorandum, above n 8, xii.

Commonwealth gave much shorter shrift to co-operative mechanisms stopping short of referral and presented the choice as a stark one between referral or status quo.

In recommending his ‘optimum model’, Williams was keen to preserve as much autonomous State involvement as possible. Aside from making recommendations about the negotiation process and a timetable towards securing an intergovernmental agreement (hereafter ‘IGA’) between participating governments, the aim of keeping the States in the game was instrumental to several of the positions he adopted.

First, Williams insisted that the governance arrangements underpinning the co-operative scheme should be ‘enshrined in the national law’ – not merely appended to it, but ‘in a legally enforceable form that in the event of a breach will trigger legal consequences (such as to prevent non-complying amendments from having effect)’.³⁰ Basing the scheme on clear legal rules rather than merely goodwill was crucial to its survival when threatened by strong disagreement.³¹ The governance arrangements Williams advocated related largely to the role of a new Ministerial Council (‘MC’) in the area and an independent secretariat to support it. The MC would have carriage of overall strategic direction, development and control of the system but the most important aspect of this in real terms was to be the capacity of States through this body to exercise control over the Commonwealth’s power to amend the *Fair Work Act* in non-trivial ways. Williams recommended that amendments not of a ‘purely technical or machinery nature’ should require the consent of a two thirds majority of the MC, including a majority of the States (as the referring bodies, Williams argued they should enjoy voting rights distinct from those of the Territories whose participation in the scheme was assured).³² Williams wanted consent to be indicated via a formal instrument or certification rather than mere acquiescence.³³ A failure of compliance would rob any amendments to the law of legal validity.

Second, Williams supported the exclusion by the States of a generous range of matters from the scope of what they referred to the Commonwealth – both general and jurisdiction-specific. Suffice to say that the latter especially makes for a rather complicated construction of what is aiming to be a simplified national system. Undoubtedly Williams’ purpose was to recommend a path which would make it as attractive as possible for the States to commit at some level and from which they could then possibly work towards greater uniformity ‘through a staged process over a period of time’.³⁴ But in the meantime, navigating the *Fair Work Act* must be done carefully on a State by State basis – despite the high commonality between the many exclusions there remain reasonably subtle differences.

Both the governance arrangements and exclusions of the States’ referrals which have enabled the extension of the *Fair Work Act* are discussed further below. But it is

³⁰ Williams, above n 14, p 89.

³¹ Ibid.

³² Ibid, p 37 and 91.

³³ Ibid, p 92.

³⁴ Ibid.

appropriate at this juncture to turn directly to the referrals power itself in order to understand both its utility to a scheme like this but also its inherent ambiguity.

IV Section 51(xxxvii) – general principles

The power to legislate with respect to State referrals is found in section 51(xxxvii) of the Constitution and is granted in the following terms:

(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.

The power has received only very limited judicial exposition and did not even arise for the consideration of the High Court until 1950 – despite earlier attempts by Australian governments to use it, notably in both world wars.³⁵ It has hardly been a staple in the Court’s workload since. Indeed, in 1990, Professor Greg Craven lamented ‘the fall and fall of a placitum’ and suggested there was ‘no real future for the exercise of s 51(xxxvii)’.³⁶ Events in the 20 years since have illustrated the danger of such predictions. The reference power has come into its own and underpins Commonwealth legislation on a range of important topics – notably mutual recognition of regulatory standards for goods and occupations, corporate regulation, and anti-terrorism measures. It is not insignificant that the bigger the policy issue, the more pressing the case is for the certainty attainable through referral. Since the shock of losing the *Incorporation Case*³⁷ in 1990, it is arguable that the Commonwealth has far less appetite for enacting constitutionally precarious legislation. Sometimes this results in what is subsequently revealed to be overcaution – the ruling in *Thomas* about the width of the Commonwealth’s defence power made it clear that the State referrals were actually of little importance in enacting valid federal anti-terrorism law.³⁸

Much of what is established about the referrals power comes from a handful of cases, supplemented by academic consensus on core elements. The Convention Debates can, on some aspects, prove more useful than is generally the case. For instance, they make it very clear that use of the power in s 51(xxxvii) may result in a law of general application or one limited only to those States making the reference or subsequently adopting the Commonwealth Act. To the framers the utility of the power was perceived as one which would allow the States to overcome their lack of extraterritorial legislative capacity so as to address a shared problem across a region of the country (two examples given of such a

³⁵ For this early history, see G AR Johnson, ‘The Reference Power in the Australian Constitution’ (1973) 9 *MULR* 42 at 47-55; and also Senex, ‘Commonwealth Powers Bill – A Repletion of Opinions’ (1943) 16 *ALJ* 323.

³⁶ G Craven, ‘Death of a Placitum: The Fall and Fall of the Reference Power’ (1990) 1 *Public Law Review* 285 at 286.

³⁷ *New South Wales v Commonwealth* (1990) 169 CLR 482.

³⁸ See generally, A Lynch, ‘*Thomas v Mowbray*: Australia’s ‘War on Terror’ Reaches the High Court’ (2008) 32 *MULR* 1182.

scenario were a boundary dispute or the management of a river system),³⁹ was central to support for its inclusion in the Constitution.⁴⁰ Indeed, the possibility of enabling a federal law limited in such a way featured far more frequently in the debates than potential use of the referral power to create a national law of uniform application.⁴¹ It is probably fair to say that the prospect, of which the *Fair Work Act* is an illustration, of some States referring to the Commonwealth a generic ‘matter’ over which their neighbours continued to enjoy exercising legislative power seemed generally unrealistic to the framers.⁴²

The text of the power leaves no doubt that the ‘matter’ that is the subject of a State referral is not State legislative power per se.⁴³ The resulting law is still one made in the exercise of the legislative power of the Commonwealth⁴⁴ and, as such, is subject to all the restrictions imposed by the Constitution upon the exercise of that brand of power.⁴⁵ Distinguishing the simple referral by a State of a ‘matter’ from an actual transfer or delegation of its legislative power is entirely consistent with the referral power being found amongst the list of powers shared by the Commonwealth and State Parliaments.⁴⁶

Consequently, the States retain their legislative capacity with respect to any referred ‘matter’,⁴⁷ though any existing or future laws they enact may be rendered invalid to the extent of any inconsistency with a Commonwealth statute passed pursuant to a State referral.⁴⁸ It is possible, of course, to devise strategies which avoid or at least limit the likelihood of this occurring and which might be agreed upon by the respective legislatures in order to facilitate the referral.⁴⁹ A clear statement of an intention within the Commonwealth law that it is not intended to ‘cover the field’ of the subject-matter with which it is concerned will not dispose of the risk of a direct inconsistency being found,⁵⁰

³⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 221 (Richard O’Connor and Sir John Downer, respectively).

⁴⁰ *Ibid*, 222 (Isaac Isaacs).

⁴¹ *Ibid*, 220 (Sir John Downer).

⁴² *Federal Convention Debates*, above n 39, at 221 (Sir John Downer).

⁴³ R Anderson, ‘Reference of Powers by the States to the Commonwealth’ (1951-53) *UWALRev* 1 at 6.

⁴⁴ *First Airlines Case* (1964) 113 CLR 1 at 53 (Windeyer J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 216 (Deane and Toohey JJ).

⁴⁵ *Graham v Paterson* (1950) 81 CLR 1 at 22 (McTiernan J). On this point, Johnson discussed the express limitations on Commonwealth power found in ss 92, 99 and 116 of the Constitution: above n 35, at 63-4, but of course implied limitations also pertain: *Thomas* (2007) 233 CLR 307 at 462 (Hayne J).

⁴⁶ See, eg, *Graham v Paterson* (1950) 81 CLR 1 at 19 (Latham CJ), and also contemporary commentary in Anderson, above n 43, at 5; K H Bailey, ‘Fifty Years of the Australian Constitution’ (1951) 25 *ALJ* 314 at 335.

⁴⁷ *Graham v Paterson* (1950) 81 CLR 1 at 22. See also (1950) 81 CLR 1 at 25 (Williams J).

⁴⁸ *Sande v Registrar of the Supreme Court of Queensland* (1996) 64 FCR 123 at 131 (Lockhart J); *Work Choices* (2006) 229 CLR 1 at 272 at [903] (Callinan J).

⁴⁹ P Tate SC, ‘New Directions in Co-operative Federalism: Referrals of Legislative Power and their Consequences’ (Paper delivered at the Gilbert + Tobin Centre of Public Law 2005 Constitutional Law Conference, Sydney, 18 February 2005) at [34].

⁵⁰ *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563 (Mason J).

and something more specific may be necessary to hem in Commonwealth power.⁵¹ A major issue in referral negotiations is ensuring that certain State laws are protected from this effect of s 109 of the Constitution by carefully delineating the scope of the Commonwealth Act.

As to how the ‘matter’ itself is referred, in *R v Public Vehicles Licensing Tribunal (Tas); Ex parte Australian National Airways Pty Ltd*,⁵² the High Court said 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’.⁵³ In that case, the challenged State law simply provided that, subject to certain temporal conditions, ‘the matter of air transport is referred to the parliament of the Commonwealth’.⁵⁴ State referral of simply a topic, rather than precisely framed legislative text which the Commonwealth is empowered to enact by virtue of the reference, enjoys little contemporary popularity. However, the difficulty of a generalised referral is not easily avoided when it comes to the amendment reference – a point discussed at greater length below in respect of the States’ ongoing support of Commonwealth maintenance of the *Fair Work Act*.

A great deal of attention in the literature on the referrals power concentrates on the prospect of termination. In addition to confirming the open-ended form in which a referral may be made, *Public Vehicles Licensing* also made it clear that the States could impose conditions upon the referral – including those which would determine the referral after the elapse of a specified period or upon the happening of an event.⁵⁵ This had been a contentious issue in the negotiations over a war-time referral from the States, with no clear opinion emerging on whether s 51 (xxxvii) authorised a ‘gift’ or merely a ‘loan’ of a subject-matter of State legislative competence to the Commonwealth.⁵⁶ The Court’s unanimous view was that:

It is plain enough that the Parliament of the State must express its will and it must express its will by enactment. How long the enactment is to remain in force as a reference may be expressed in the enactment. It none the less refers the matter. Indeed the matter itself may involve some limitation of time or be defined in terms which involve a limitation of time...There is no reason to suppose that the words ‘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.⁵⁷

⁵¹ See C Saunders, ‘A New Direction for Intergovernmental Agreements’ (2001) 12 *PLR* 274 at 284, discussing the scheme adopted to this end by the Corporations Act 2001 (Cth), pt 1.1A. See also *Fair Work Act* 2009 (Cth), pt 1-3.

⁵² (1964) 113 CLR 207 (*Public Vehicles Licensing*).

⁵³ *Ibid* 225.

⁵⁴ Commonwealth Powers (Air Transport) Act 1952 (Tas), s 2.

⁵⁵ The legislation in question, the Commonwealth Powers (Air Transport) Act 1952 (Tas), s 3, provided the Governor with power to ‘at any time, by proclamation, fix a date on which this Act shall cease to be in force’. Section 4(b) of the Act provided that, as a consequence, ‘no law made by the Parliament of the Commonwealth with respect to the matter of air transport shall continue to have any force or effect by virtue of this Act or the reference made by this Act’.

⁵⁶ Senex, above n 35, at 325.

⁵⁷ *Public Vehicles Licensing* (1964) 113 CLR 207 at 226.

However, while the Court confirmed that a referral was so ‘determinable’, it declined to address what one might have thought was the interrelated question of whether the State might simply repeal a referring statute, strangely describing this as ‘only a subsidiary matter which if decided might throw light on the whole ambit or operation of the paragraph’.⁵⁸ The Court’s reluctance to clarify whether this is possible, has understandably led to States seeking to retain some level of control over their referrals through insertion of clauses providing for their determination after a certain time⁵⁹ or through executive action.⁶⁰ The *Fair Work Act* is no exception.

V Coming on board? The States and the *Fair Work Act*

Having now outlined the pre-history to the *Fair Work Act* in terms of both the constitutional challenge of achieving a national IR scheme and the recommendations of the Williams report and also the basic features of the referral power, how did these come together to produce the *Fair Work Act (State Referrals and Other Measures) Act 2009*? The culmination of this story – at least for now – is the multilateral IGA signed by all States, barring Western Australia, and Territories by or on 11 December 2009.⁶¹

The only certainty for signing on to the Commonwealth’s plan for construction of a national scheme was Victoria in light of their earlier 1996 referral. As Williams conjectured, ‘once a State industrial system is gone, it may be incapable of being restored’.⁶² Consequently, Victoria and the Commonwealth made an interim bilateral IGA on 11 June 2009 and the State enacted legislation effecting a text-based referral effective from 1 July, revoking its earlier referral and making consequential amendments to a number of State Acts.⁶³ The referred text was inserted into the *Fair Work Act* as Division 2A.

Professor Owens has written a detailed account of the negotiations process by which the other States came on board for the making of December’s agreement.⁶⁴ The two Territory governments were generally supportive and are also signatories to the IGA, but as recognised in clause 1.3 of that document, in constitutional terms their participation was assured by the Commonwealth’s power under s 122 of the Constitution. Western Australia was, as mentioned, the only government not to sign up – even as a ‘cooperating jurisdiction’ defined to mean one which is ‘committed to forms of cooperation and

⁵⁸ Ibid. On the link between the two questions see *First Airlines Case* (1964) 113 CLR 1 at 38 (Taylor J); cf at 52-3 (Windeyer J). The participation of both these judges in the unanimous opinion in *Public Vehicles Licensing* delivered just a few weeks later may well explain its inconclusiveness on the issue.

⁵⁹ See, eg, Corporations (Commonwealth Powers) Act 2001 (NSW), s 5.

⁶⁰ See, eg, Terrorism (Commonwealth Powers) Act 2002 (NSW), s 5.

⁶¹ Workplace Relations Ministerial Council, *Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector*, 11 December 2009 available at: <<http://www.deewr.gov.au/WorkplaceRelations/WRMC/Documents/IGA.pdf>>.

⁶² Williams, above n 14, p 48.

⁶³ Fair Work (Commonwealth Powers) Act 2009 (Vic).

⁶⁴ Owens, above n 8, at 276-82.

harmonisation other than enacting referrals of power or mirror legislation' to achieve a national system.⁶⁵ In the accompanying communiqué the State merely 'agreed to continue to aim for national harmonisation of work health and safety'.⁶⁶

A *What is referred?*

In accordance with the IGA, the States have enacted legislation referring the following matters to the Parliament of the Commonwealth:

- (a) the matters to which the initial referred provisions relate, but only to the extent of the making of laws with respect to those matters by including the initial referred provisions in the Commonwealth Fair Work Act, as originally enacted, and as subsequently amended by amendments enacted at any time before this Act commences, in the terms, or substantially in the terms, set out in the scheduled text,
- (b) the referred subject matters, but only to the extent of making laws with respect to any such matter by making express amendments of the Commonwealth Fair Work Act,
- (c) the referred transition matters.⁶⁷

The 'initial reference' is the text of Pt 1-3, Divs 2A and 2B – the former relating only to Victoria; the second to all other referring States. The two Divisions are essentially identical. The basic effect of a State's referral is to extend the definitions of 'national system employee' and 'national system employer' in ss 13 and 14 respectively of the *Fair Work Act* beyond their scope under the Commonwealth's existing legislative powers, chiefly corporations, so as to cover individuals in that jurisdiction who simply employ, or are employed by, others in the private sector.⁶⁸ The reach of the *Fair Work Act* to govern outworker entities is similarly extended by virtue of the referral.⁶⁹ Special provisions acknowledge the inclusion of law enforcement officers within the general extension enabled by the referral unless States have chosen to exclude them⁷⁰ – an oddly circular attempt at clarity since one must return to each referring Act to determine the position of law enforcement personnel, along with other public sector and local government employers and employees.

Additionally, the Divisions specify the meaning of key terms indicating the scope of the industrial matters which are referred in respect of such persons. These have most significance in understanding the second aspect of the referral – and the important one from this point forward – the 'amendment reference'. While the initial reference is, of course, simply set out in the text, the true scope of any matter which the States are

⁶⁵ Above n 61, cl 3.6.

⁶⁶ WRMC 84 Communique, 11 December 2009, available at: <<http://www.deewr.gov.au/WorkplaceRelations/WRMC/Documents/11Dec09.pdf>>.

⁶⁷ NSW, s 5(1). Comparable/identical except in Victoria where the referral makes no reference to subsequent amendments: Fair Work (Commonwealth Powers) Act 2009 (Vic), s 4(1).

⁶⁸ Fair Work Act, ss 30C, 30D, 30M and 30N.

⁶⁹ Fair Work Act, ss 30F and 30Q.

⁷⁰ Fair Work Act, ss 30G and 30R.

leaving to the Commonwealth is made clear by the referral of capacity to amend the law. It is on this crucial point that the great challenge underpinning use of the referrals power turns – how to ensure flexibility of Commonwealth power over the resultant statute while also observing and preserving the limits of the State’s reference?

In the case of the *Fair Work Act*, this difficulty is nowhere near as pronounced as it is in respect of some other statutes. In conferring power over the ‘referred subject matters but only to the extent of making laws with respect to any such matter by making express amendments of the Commonwealth Fair Work Act’, the State laws are admirably specific. In the New South Wales referral, ‘referred subject matters’ is defined to mean a great range of topics including terms and conditions of employment; the rights and responsibilities of persons in the workplace regarding freedom of association, discrimination, industrial action, termination and so on; and the application, enforcement and operation of the Commonwealth Fair Work Act. The law expressly states that ‘referred subject matters’ does not include any excluded subject matter.

However, this can be contrasted with amendment references cast in more general terms. For example, section 4(1)(b) of the *Terrorism (Commonwealth Powers) Act 2003* (Vic) confers a power to amend the initial text regarding simply ‘the matter of terrorist acts, and actions relating to terrorist acts’. Similarly, section 4(1)(b) of the *Corporations (Commonwealth Powers) Act 2001* (Vic) refers amendment on ‘the matters of the formation of corporations, corporate regulation and the regulation of financial products and services’.

What all these referrals have in common, however, are the qualifying words which follow the use of the ‘matter’ in question. What does it signify that power with respect to these matters is referred ‘only to the extent of making laws with respect to any such matter by making express amendments of the Commonwealth Fair Work Act’? Using a formulation which also recurs throughout referring legislation, ‘express amendment’ is defined by the States as follows:

‘Express amendment’ of the Commonwealth Fair Work Act means the direct amendment of the text of that Act (whether by the insertion, omission, repeal, substitution or relocation of words or matter), but does not include the enactment by a Commonwealth Act of a provision that has, or will have, substantive effect otherwise than as part of the text of the Commonwealth Fair Work Act.⁷¹

Just how much freedom this provision gives the Commonwealth to use the amendment reference to insert substantially new provisions was the contentious issue in *Thomas*. In that case, the Commonwealth’s reliance on an essentially identical clause to ‘expressly amend’ the Criminal Code by inserting an entirely new Division providing a scheme of control orders for terrorism suspects, was challenged as invalid. Only Kirby and Hayne JJ considered the role of the States’ referral of legislative power under s 51(xxxvii) in supporting the Division, and their Honours reached opposing conclusions. Justice Hayne observed that the definition of ‘express amendment’ in the referring statute appeared to

⁷¹ Industrial Relations (Commonwealth Powers) Act 2009 (NSW), s 3(1).

be ‘contradictory’.⁷² Indeed, it is difficult to imagine how ‘direct amendment’ of legislative text could refer to the enactment of a provision with ‘substantive effect otherwise than as part of the text’. His Honour ultimately interpreted the reference to allow the insertion of any new matter concerning ‘terrorist acts, and actions relating to terrorist acts’ so long as this is ‘done by express amendment to the law that was enacted in the form of the scheduled text’.⁷³ On this view the second part of the definition must be understood as excluding use of the reference by the Commonwealth to support an implied amendment of the statute through a later and separate enactment.⁷⁴

Justice Kirby rejected the suggestion that the addition of any new material to the Code could be seen as the mere amendment of the text initially referred, arguing instead that this undermined the requirement (replicated in the provisions of the *Fair Work Act*) that enactment pursuant to the initial reference must be ‘in the terms, or substantially in the terms, set out in the scheduled text’.⁷⁵ Justice Hayne’s view that the nature of any subsequent insertion was unconstrained by the scope of the initial reference relied on a later subsection⁷⁶ (also replicated in the referrals for the *Fair Work Act*)⁷⁷ stipulating that the operation of the separate referrals are not affected by each other.⁷⁸ The result of this is essentially to unfetter use of the amendment reference from the constraints of the initial text-based one. However Kirby J, in insisting that the initial text remained central to the whole enterprise, pointed to the specific content of the expression ‘terrorism legislation’ used in both the amendment reference and the definition of ‘express amendment’. Under s 3 of the Referring Act, ‘terrorism legislation’ was defined to refer to ‘the provisions of part 5.3 of the Commonwealth Criminal Code enacted in the terms, or substantially in the terms, of the text set out in Schedule 1 and as in force from time to time’.⁷⁹ But his Honour’s analysis arguably made too light of the practical difficulties and uncertainty that would flow from his conclusion that the intersection of these provisions required that ‘a more restrictive meaning be given to the term ‘insertion’ in the meaning of ‘express amendment’.⁸⁰

While the definition of ‘express amendment’ appeared to non-plus both Justices Kirby and Hayne, its basic rationale is not hard to appreciate –limiting use of the amendment reference to make changes directly to the text of the Act resting upon the initial referral

⁷² *Thomas* (2007) 233 CLR 307 at 462.

⁷³ *Ibid.*

⁷⁴ However, the referring legislation (eg. Industrial Relations (Commonwealth Powers) Act 2009 (NSW), s 5(4)) acknowledges that the Act ‘may be expressly amended, *or have its operation otherwise affected*’ by a Commonwealth law based upon legislative powers aside from that of s 51(xxxvii) and any referrals (author’s emphasis).

⁷⁵ Terrorism (Commonwealth Powers) Act 2003 (Vic), s 4(1)(a).

⁷⁶ Terrorism (Commonwealth Powers) Act 2003 (Vic), s 4(1)(3).

⁷⁷ Industrial Relations (Commonwealth Powers) Act 2009 (NSW), s 5(3).

⁷⁸ *Thomas* (2007) 233 CLR 307 at 461-62.

⁷⁹ Additionally, Kirby J quoted the Victorian Attorney-General’s second reading speech in support of the law effecting the reference of power for Part 5.3, wherein the Minister indicated his understanding that the referral was ‘limited to only that necessary to enact terrorism offences in the same form, or substantially the same form, as the present Commonwealth terrorism offences and to amend them as required’: *Thomas* (2007) 233 CLR 307 at 378.

⁸⁰ *Ibid* at 379.



triggers the governance arrangements of the underlying IGA. In *Thomas* there was a real edge to this since the legislation itself gave statutory force to the governance requirements of the IGA. Section 100.8 of the Criminal Code purports to require the approval of ‘a majority of the group consisting of the States, the Australian Capital Territory and the Northern Territory’, but at least four states, to any ‘express amendment’ of Part 5.3. Section 100.8 makes it apparent that the qualification in the definition of ‘express amendment’ serves a purpose beyond mere formalism. The requirement for any changes to the law to be made directly on its face, rather than through implied amendment, ensures the States are alerted by the Commonwealth of the need for their approval. As a prospective means of resolving uncertainty over which express amendments to the terrorism legislation are permissible and which constitute an unacceptable deviation, State approval has a lot going for it. It has obvious advantages over judicial attempts to line draw in the way attempted by Kirby J in that case so as to protect State interests after the Commonwealth has purported to use the amending reference. A legislative provision such as this lets the States monitor and control the use of their amendment reference.

Unfortunately, however, there are substantial constitutional difficulties with statutory provisions which attempt to recognize controls agreed upon in the political deal-making which has produced the intergovernmental agreement. In *Thomas*, Kirby, Hayne and Callinan JJ were all of the view that s 100.8 of the Criminal Code was invalid – although each for different reasons. Kirby J objected to the provision’s apparent attempt to substitute the approval of the executive members of state and territory governments for the power of the state legislatures to refer matters under s 51(xxxvii) of the *Constitution*.⁸¹ Hayne J thought s 100.8 was invalid as a fetter on the future actions of the Commonwealth Parliament,⁸² while Callinan J focused on the section’s purported subjugation of a state parliament’s powers to the decision of a majority of other states and also the territories.⁸³

Hayne J presented his objection as the fundamental one rendering consideration of the others unnecessary, but so far as it applies generally to Commonwealth use of the amendment reference (aside from partial or total repeal of a law enacted under s 51(xxxvii)),⁸⁴ it warrants closer examination. It is arguable that his Honour’s complaint that a federal provision stipulating that ‘certain amending laws may be made *only* if prior approval is given’ is a fetter imposed by the Parliament on ‘the future exercise of its

⁸¹ *Thomas* (2007) 233 CLR 307 at 381–3.

⁸² *Ibid* 462.

⁸³ *Ibid* 509.

⁸⁴ A further difficulty with s 100.8 is its imposition of the need for State/Territory approval on the making of any ‘express amendment’ (as that phrase is defined in s 100.1 of the Code and s 3 of the Referring Act) including apparently even those instances where the Commonwealth seeks to amend the legislation using powers other than s 51(xxxvii). Twomey suggests s 100.8’s ambit restriction on amendment is ineffective: A Twomey, *The Constitution of New South Wales*, Annandale NSW, 2004, p 814 (fn 102). That must be correct, and indeed s 100.8’s breadth is hard to square with the recognition by s 4(4) of the State Referring Act of the Commonwealth’s independent ability to amend the legislation using its other powers..



legislative powers'⁸⁵ does not adequately acknowledge the unusual nature of this particular power and its implications for the doctrine of parliamentary sovereignty. When using a power to amend legislative text referred by the States which is itself the subject of a referral, surely the Commonwealth's legislative capacity is both more complex, and inherently less free, than when utilising the other powers expressly conferred upon it by the Constitution?⁸⁶

A way forward, while still acknowledging that difference, might be the path suggested by Justice French (as he then was):

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.⁸⁷

This would recognise the unique qualities of the power, while managing to avoid the constitutional difficulty of attempting to give direct statutory force to a pre-enactment approval mechanism agreed upon by the parties to the intergovernmental agreement. The States would still retain de facto control of the use by the Commonwealth of the reference, without the federal Parliament enacting a provision which represents a formal curb on its own legislative capacity, such as s 100.8, of questionable validity.

Three clarifications about these issues in respect of the *Fair Work Act* should be briefly stated. First, presumably burnt by the doubt cast upon the validity of s 100.8 in *Thomas*, the *Fair Work Act* contains no provision giving recognition to governance of the underlying co-operative scheme – despite, as we saw, this being very strongly recommended by Williams in his inquiry. Second, nor do the referring Acts of the States explicitly recognise those mechanisms. Third, and this is an important distinction, the potential for misuse by the Commonwealth of the amendment reference is substantially less under the *Fair Work Act* than in the case of earlier referrals, since the definition of 'referred subject matters' is, as already noted, articulated with extensive specificity.

B What is excluded?

⁸⁵ *Thomas* (2007) 233 CLR 307 at 462.

⁸⁶ As Buchanan said, 'When the Commonwealth Parliament legislates on a matter referred by a State, its power springs from two sources. One is section 51(xxxvii) giving it power to legislate over matters referred to it, and the other is the State Act. The State Act provides a basis or field for the operation of the power contained in section 51(xxxvii)...To say that a State Act referring a matter to the Commonwealth adds a power to those listed in section 51 – a power that becomes part of the Constitution that cannot be amended save under section 128 – seems misleading': P Buchanan, '*The Queen v Public Vehicles Licensing Appeal Tribunal of Tasmania; Ex parte Australian National Airways Ltd – Case Note*' (1964-65) 1 *Federal Law Review* 324 at 326.

⁸⁷ French, above n 3, at 34; Justice French, 'Horizontal Arrangements: Competition Law and Cooperative Federalism' (Speech delivered at the Competition Law Conference, Sydney, 5 May 2007) at [31]. This approach is also supported by Williams, above n 14, p 89.



The scope of the referrals is further defined by fairly extensive lists of exclusions which are included in the States' referencing legislation. The term 'exclusion' is employed by most of the States and the Commonwealth in an inter-related but distinct sense. So while at the State level, matters over which the States have sought to retain control are referred to as 'excluded subject matter,'⁸⁸ these very same topics are expressly stated as ones *not* excluded by the operation of the Commonwealth Act.⁸⁹ Despite the slightly confusing reversal of terminology, the effect of both laws is complementary rather than contradictory.

The Commonwealth has skimmed the first item from each State's list of exclusions – their general anti-discrimination legislation and in s 27(1A) expressly provides that these are not excluded by its own enactment. In subsection (2) of that provision, the Commonwealth expressly recognises those other matters which the States have excluded from their referral, including superannuation, workers compensation, occupational health and safety, trading hours and various forms of leave.

Additionally, it is necessary to bear in mind a further list of 'excluded subject matters' from the State referrals. These refer not to aspects of employment, but particular types of worker, essentially those in a variety of government roles, who are not to be subject to the Commonwealth law as extended by the referral. It should be noted that the States have taken steps to exclude not just those high-end State government positions which are constitutionally immune from Commonwealth control (essentially Ministers, parliamentarians and judges),⁹⁰ but also their public sector employees more generally. Although there is a high commonality in respect of the 'excluded subject matters', subtle variations are found between States. For example, in the New South Wales provision, both law enforcement officers and local government employees are excluded⁹¹ However, Tasmania does not exclude local government employees.⁹² South Australia has the most detailed definition of law enforcement officers but further extends its exclusion to persons employed as protective security officers under the *Protective Security Act 2007* of that State.⁹³ While most States simply exclude law enforcement comprehensively, Victoria does not. Instead, the approach in that States is to exclude only 'matters pertaining to the number, identity or appointment' of law enforcement officers, and additionally some terms and conditions of their appointment, subject to exceptions.⁹⁴ This accords with the specificity with which Victoria has excluded aspects of public sector employment generally.⁹⁵

⁸⁸ Eg see Industrial Relations (Commonwealth Powers) Act 2009 (NSW), s 3(1). In the equivalent Victorian legislation these are known as 'State subject matters': Fair Work (Commonwealth Powers) Act 2009 (Vic), s 3.

⁸⁹ Fair Work Act 2009 (Cth), s 27.

⁹⁰ *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 234, (Mason CJ, Brennan, Deane, Toohey, Gaudron, and McHugh JJ).

⁹¹ Industrial Relations (Commonwealth Powers) Act 2009 (NSW), s 6.

⁹² Industrial Relations (Commonwealth Powers) Act 2009 (Tas), s 6.

⁹³ Fair Work (Commonwealth Powers) Act 2009 (SA), s 6(g).

⁹⁴ Fair Work (Commonwealth Powers) Act 2009 (Vic), s 5(2).

⁹⁵ Fair Work (Commonwealth Powers) Act 2009 (Vic), s 5(1)(a), (b), (h), (j) and (k).

Consequently, while the extended operation of the Commonwealth's *Fair Work Act* achieved by the referrals does promote a greater uniformity across all participating jurisdictions, that uniformity is not exactly perfect. Practitioners in each jurisdiction will still need to look to the referring legislation itself to be sure of the extent to which certain individuals are kept outside the federal system – a point reinforced by both Divisions of the Commonwealth Act.⁹⁶ This is particularly so with Victoria given the way in which excluded matters are itemised in its referral. But then its rather distinctive position under the scheme is already signposted by its reference being legislated for under a different Division from that of the other participating States. The few differences between various State referrals should not be overemphasised as a negative. For one thing, the States are entitled, even when being generally co-operative, to retain control in those specific areas they are reluctant to cede to the Commonwealth or which have a pronounced significance locally. More crucially, it should be recalled that the Williams report favoured allowing as much flexibility to the States as was necessary to attract them to the co-operative enterprise and predicted that over time remaining distinctions between them would dissolve and true uniformity would be the likely result.⁹⁷

Unsurprisingly, what the Commonwealth Act clearly *does* exclude are all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer.⁹⁸ This comprises what are referred to as 'general State industrial laws' which are then identified by name⁹⁹ and also any other Acts applying to employment generally but have as a main purpose regulation of workplace relations or conditions.¹⁰⁰

VI Governance of the Scheme – the States' Ongoing Role

A Amendment

Under the IGA the Commonwealth undertakes to consult with referring States and the Territories in respect of any proposals and amendments to the *Fair Work Act*.¹⁰¹ In turn, the referring States and the Territories are able to make proposals in response or of their own initiative.¹⁰² The Commonwealth is to give three months notice of its proposed alterations, with all parties agreeing to keep these confidential.¹⁰³ Consultation on possible amendments is progressed through two subcommittees – one comprised of the Workplace Relations Ministers themselves and the other of the Senior Officials.¹⁰⁴ Crucially, under clause 2.18 of the IGA if one or more members of the Ministerial subcommittee considers that a proposed amendment 'may undermine one or more of the

⁹⁶ Fair Work Act 2009 (Cth), ss 30H and 30P respectively.

⁹⁷ Williams, above n 14, 92.

⁹⁸ Fair Work Act 2009 (Cth), s 26.

⁹⁹ Fair Work Act 2009 (Cth), s 26(3).

¹⁰⁰ Fair Work Act 2009 (Cth), s 26(2).

¹⁰¹ Above n 61, cl. 2.4.

¹⁰² Ibid, cl 2.11(c) and (d).

¹⁰³ Ibid, cl 2.13 and 2.14.

¹⁰⁴ Ibid, cl 2.16 and 2.17.

principles' stated earlier in the agreement and replicated in the *Fair Work Act* as the 'fundamental workplace relations principles' then it can only proceed after obtaining approval from a two-thirds majority of the subcommittee. The five 'fundamental workplace relations principles' are:

- (i) a strong, simple and enforceable safety net of minimum employment standards;
- (ii) genuine rights and responsibilities to ensure fairness, choice and representation at work, including the freedom to choose whether or not to join and be represented by a union or participate in collective activities;
- (iii) collective bargaining at the enterprise level with no provision for individual statutory agreements;
- (iv) fair and effective remedies available through an independent umpire;
- (v) protection from unfair dismissal.¹⁰⁵

Although the two-thirds majority approval mechanism for contentious proposals mirrors the recommendation of the Williams Inquiry, interestingly under the final scheme the Territories enjoy the same voting rights in this process as the referring States. While Williams considered this had some 'merit' given the total coverage of the Territories,¹⁰⁶ in his final recommendations he clearly favoured giving the States a privileged position by requiring that the two-thirds majority approval should also include support from a majority of the referring States.¹⁰⁷

There is something of a tension between the general terms in which the IGA governs amendment of the *Fair Work Act* generally and the express recognition made by the States in their referring Acts that the Commonwealth may be able to amend its legislation using legislative powers apart from that of s 51(xxxvii).¹⁰⁸ The latter is a standard inclusion in such State legislation and can operate to cast further doubt on any attempt (such as s 100.8 of the *Criminal Code*) to statutorily require State approval of any express amendments to Commonwealth legislation since it is not clear how a provision can validly empower the States to fetter the Commonwealth's enjoyment of those powers it possesses by virtue of the Constitution and without any State involvement.

As already noted, that validity question is not an issue here given the absence of any statutory recognition of the IGA governance provisions. But the subjection by the Commonwealth to the Ministerial Council processes for the ongoing maintenance of the

¹⁰⁵ Fair Work Act 2009 (Cth), ss 30B(9) and s 30L(9) which replicate cl 1.2 (a)-(e) of the IGA. In the IGA, two additional principles are stated: '(f) seamless service delivery arrangements; and (g) cooperation between all governments in the development and implementation of a National Workplace Relations System' but these are exempted from the effect proscribed by cl 2.18 for the earlier five principles. In the Commonwealth legislation (ss 30B(9)(b) and 30L(9)(b)), picking up the States referrals, the additional principles are 'that there should be, and continue to be, in connection with the operation of this Act, the following: (i) an independent tribunal system; (ii) an independent authority able to assist employers and employees within a national workplace relations system'.

¹⁰⁶ Williams, above n 14, p 37.

¹⁰⁷ Ibid, 91.

¹⁰⁸ Eg. Industrial Relations (Commonwealth Powers) Act 2009 (NSW), s 5(4).

Fair Work Act when its validity is far from substantially dependent on State referrals is a sign of the sacrifices required by intergovernmental co-operation. The recognition of the Commonwealth's other powers by the States in this case is also rather different from most referrals since here the referral does not add substantive scope to the Commonwealth law, but rather serves to extend its regulatory coverage.

B Duration/Termination of Reference – the role of ‘fundamental workplace relations principles’

Mention was made earlier of the persistent uncertainty as to whether a State can simply revoke a reference through repeal – with the High Court only prepared to confirm that State referrals could be limited to ‘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’.¹⁰⁹ Recognition of these valid mechanisms by which a State may terminate its reference, prompts the question why legislative revocation would not also be allowed. Not only would the power of the States to repeal a referring Act accord with the doctrine of parliamentary sovereignty, but it would also seem consistent with the overriding purpose of the section to permit the flexible redistribution of power.¹¹⁰ Ironically, although modern academic consensus is in favour of statutory revocation of unconditional referrals, the issue is most unlikely ever to be tested since the States are able to avoid running the risk by attaching conditions so as to facilitate termination without further parliamentary involvement.

The referrals supporting the *Fair Work Act* are further evidence of this caution. While these are, unlike the corporations referrals of 2001, of unlimited duration, the initial, amendment or transitional references are expressed to be determinable on a date fixed by the State Governor and proclaimed in the Gazette (or, in New South Wales, published on the government's website).¹¹¹ Provision is made for the revocation of the Governor's proclamation – a mechanism presumably worth laying down in case the State can be persuaded not to walk away from the scheme. The State referrals ensure that there will be a six month window for negotiations to this end, but that period is halved in respect of proclamations to terminate the amendment reference where the Governor declares that the *Fair Work Act* has been or is proposed to be amended ‘in a manner that is inconsistent with one or more of the fundamental workplace relations principles’.¹¹²

What is the effect of such a termination? The Commonwealth Act provides that the States cease to be referring States if ‘any or all’ of the three references – initial, amendment and

¹⁰⁹ *Public Vehicles Licensing* (1964) 113 CLR 207 at 226.

¹¹⁰ Buchanan, above n 86, 327.

¹¹¹ Industrial Relations (Commonwealth Powers) Act 2009 (NSW), s 7(1); Fair Work (Commonwealth Powers) Act 2009 (Vic), s 6(1); Fair Work (Commonwealth Powers) Act 2009 (Qld), s 7(1); Fair Work (Commonwealth Powers) Act 2009 (SA), s 7(1); Industrial Relations (Commonwealth Powers) Act 2009 (Tas), s 7(1).

¹¹² Industrial Relations (Commonwealth Powers) Act 2009 (NSW), s 9; Fair Work (Commonwealth Powers) Act 2009 (Vic), s 7A; Fair Work (Commonwealth Powers) Act 2009 (Qld), s 9; Fair Work (Commonwealth Powers) Act 2009 (SA), s 9; Industrial Relations (Commonwealth Powers) Act 2009 (Tas), s 9.



transitional are terminated.¹¹³ But in Division 2B, applying to all referring States barring Victoria,¹¹⁴ exceptions are made to this where the termination is of the amendment reference only. Under these provisions, the first exception provides that termination of the amendment reference will not cause a State to be no longer regarded as referring where it is done by a proclamation giving six months notice and where the amendment references of all remaining referring States terminate on the same day.¹¹⁵ The second exemption, which has no requirement of synchronicity between States, applies in the three months notice scenario where a breach of the fundamental principles is claimed, and once more the effect is to preserve the State's status as a 'referring State' despite the loss of the amendment reference.¹¹⁶

These provisions, essentially laying down the only valid ways in which a reference may be terminated, and then apparently exempting them from having that very effect in respect of amendment references are a good example of how confusing legislative attempts to formalise co-operation between Australian governments can be. Rather better clarity is found in the provisions of the referring Acts themselves which, instead of classifying the status of the States, make it explicit from when the termination of the amendment reference will affect the Commonwealth's legislation and also the extent to which the *Fair Work* will still apply in that State.¹¹⁷ For example, section 8 of the New South Wales Act provides:

- (1) If the amendment reference or the transition reference terminates before the initial reference, the termination of the amendment reference or transition reference does not affect:
 - (a) laws that were made under that reference before that termination (whether or not they have come into operation before that termination), or
 - (b) the continued operation in the State of the Commonwealth Fair Work Act as in operation immediately before that termination or as subsequently amended or affected by:
 - (i) laws referred to in paragraph (a) that come into operation after that termination, or

¹¹³ Fair Work Act 2009 (Cth), ss 30B(6) and 30L(6).

¹¹⁴ The lack of similar exceptions in Division 2A is not apparent from reading the Commonwealth Act which contains provisions identical to those in Div 2B and discussed above. But this is an error. The text of s 30B referred by Victoria to the Commonwealth by the Schedule of the Fair Work (Commonwealth Powers) Act 2009 (Vic) does not contain sub-s (7) and (8) which are found in the Commonwealth's version of that provision. Although Victoria has subsequently amended its reference (notably through the insertion of s 7A stipulating the timeframe for termination) by the Fair Work (Commonwealth Powers) Amendment Act 2009 (Vic), that legislation did not alter the text of s 30B as originally set forth in the Schedule to the primary Act. The consolidated version of the Victorian referral (available at <http://www.legislation.vic.gov.au/>, accessed 20 September 2010) confirms that the State has not altered the text it referred under s 30B whatever the Commonwealth legislation might purport.

¹¹⁵ Fair Work Act 2009 (Cth), s 30L(7).

¹¹⁶ Fair Work Act 2009 (Cth), s 30L(8).

¹¹⁷ Industrial Relations (Commonwealth Powers) Act 2009 (NSW), s 9; Fair Work (Commonwealth Powers) Act 2009 (Vic), s 7A; Fair Work (Commonwealth Powers) Act 2009 (Qld), s 9; Fair Work (Commonwealth Powers) Act 2009 (SA), s 9; Industrial Relations (Commonwealth Powers) Act 2009 (Tas), s 9.



- (ii) provisions referred to in section 5(4).
- (2) Accordingly, the amendment reference or transition reference continues to have effect for the purposes of subsection (1) unless the initial reference is terminated.¹¹⁸

Section 8(1)(b) makes it clear that the *Fair Work Act* will continue to apply in the State in its extended operation to national system employers and employees by virtue of the initial reference and as amended by the Commonwealth using legislative powers other than s 51(xxxvii). If a State really wants to stop the *Fair Work Act* dead in its application to workers captured by the extended meaning of ‘national system employees’ it obviously should terminate its initial reference.

VII Conclusion

In *Graham v Paterson*, Latham CJ said that, when a State refers a matter to the Commonwealth Parliament, ‘it produces the result of adding to the paragraphs of s 51 a further paragraph specifying the matter referred’.¹¹⁹ While that has a superficial truth to it, the reality is rather more complex, as the construction of the *Fair Work Act* makes all too apparent. Although the Commonwealth is to be commended for persevering with difficult negotiations with the States in order to extend the operation of the national industrial relations scheme beyond the limits imposed by main reliance on the corporations power, and one can agree with Professor Owens that the progress towards a national system has been ‘nothing short of remarkable’,¹²⁰ the experience shows that, nevertheless, one set of uncertainties may be traded for another when the referrals power is brought into play. This is not simply to point to the ambiguities which persist in respect of that power, but also to emphasise that the differing attitudes and approaches of the States will often continue to have an impact of the regulatory scheme even after agreement is secured.

To be fair, that is the anticipated price of ‘co-operation’. That which results will never be as seamless as the Commonwealth acting alone going its own way. In the case at hand, this is seen through contrasting the generosity of the referral by Victoria, where even public sector employees are not totally excluded from the Commonwealth’s scheme, with the absolute non-cooperation of Western Australia, while subtle distinctions exist between the other four States in between. Although Williams pointed to flexibility in the immediate term as the pathway towards a more coherent system in the long run, and this may well be the only way to negotiate such a scheme, we should not fool ourselves that referrals make everything straightforward. There is rather more to it than Latham CJ’s analogising s 51(xxxvii) to the other legislative powers the Commonwealth has at its disposal – particularly in an area as complex as this one.

In addition, there are the governance arrangements which both underpin the referral and supplement the legislative instruments through which the Commonwealth law is

¹¹⁸ The equivalent provision in other States is Fair Work (Commonwealth Powers) Act 2009 (Vic), s 7; Fair Work (Commonwealth Powers) Act 2009 (Qld), s 8; Fair Work (Commonwealth Powers) Act 2009 (SA), s 8; Industrial Relations (Commonwealth Powers) Act 2009 (Tas), s 8.

¹¹⁹ (1950) 81 CLR 1 at 19.

¹²⁰ Owens, above n 8, at 283.

constructed. In the context of the *Fair Work Act*, we might surmise that the States have not fared as well as perhaps they might have – particularly if we use the Williams report as a benchmark. The governance arrangements, the means through which the States are kept in the game, are left largely in the realm of political goodwill with no clear statutory recognition – apart from a perceived straying from the ‘fundamental principles’ supporting an expedited termination by a State of its reference. Nor is the States’ constitutional precedence over the territories recognised in the ongoing control of the ministerial council over the development of the legislation.

More broadly, but building on the importance of the States’ continued role in use of the referrals mechanism, it might be said that lacking from most judicial consideration of the reference power has been clear acknowledgement of its distinctive characteristics as a facilitator of co-operative federalism. This has tended to result in an interpretation which, even after a referral is made, declines to accord sufficient significance to the role that has been played by the States. However, the present Chief Justice has posited that ‘the Constitution, while marking out the boundaries of legislative power between the components of the Federation, rests upon an assumption of co-operation between them’, and has highlighted the reference power as ‘an instrument of co-operative constitutional evolution’ to this end.¹²¹ While a surrendering of control by the States is implicit in the use of s 51(xxxvii) to produce what is a Commonwealth law that can be neither total nor permanent if federal ‘co-operation’ is the guiding principle. Consequently, due recognition of the continued interest which the referring States have in the subject-matter they have made available for the operation of Commonwealth legislative power has the potential to affect the construction of both the initial referral and the extent to which the accompanying amending reference may be used to depart from it. Similarly, the capacity for States to revoke a reference and the consequences of termination more generally must take their cue from reading the power in this way.

While the issue of revocation has been reduced to an essentially academic question, the aspect of s 51(xxxvii) which remains of continued practical importance is the capacity of the Commonwealth to amend laws made under the power and the ability of the States to constrain this in order to preserve the limits placed on the initial reference. The deficiencies of the standard legislative formulation governing the making of ‘express amendments’ when not accompanied by an extensive list of permissible topics was made apparent in the counter-terrorism context in *Thomas*. The much more calibrated approach to the industrial relations referrals supporting the Commonwealth’s *Fair Work Act* was doubtless a product of the particular subject-matter in this case, but all the same it will certainly have the effect of constraining the Commonwealth’s capacity to stray too far from the initial text-based reference it has received from the States.

The poor reception given in *Thomas* to s 100.8 as a legislative mechanism reflecting States’ rights under the intergovernmental agreement presumably influenced the decision not to make a similar attempt to directly secure their position in a similar way in the *Fair Work Act*. However, it is hard to disagree with Williams’ view that the governance arrangements should ideally be given legislative bite. Some solution to the objections

¹²¹ French, above n 3, at 21.

raised by members of the High Court in *Thomas* should be possible. It may lie in making the referrals conditional upon adherence to governance requirements as French CJ has suggested, though it remains tempting to think that Commonwealth laws could also squarely address the issue if we start with recognition of the rather mixed nature of the legislative power which it is utilising in enacting legislation in these circumstances.

Clarification of these outstanding issues should ideally occur in the context of a comprehensive judicial exposition of the referrals power which has to date proved elusive. In the meantime, the evident attractions of the power will surely see it used to support major national legislative schemes. The continuing renaissance of the referrals power must, one would think, increase the likelihood that the Court will be required to meaningfully engage with s 51(xxxvii) at long last. It is to be hoped that the unique properties and purpose of the power are not lost sight of when that opportunity arises.

