

Chapter 11

The Reference Power: The Rise and Rise of a Placitum?

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I Introduction

The title of this chapter owes a debt to Professor Greg Craven, who in 1990 published a brief critique of the Commonwealth Parliament's power to enact laws on matters referred to it by the states.¹ Writing under the title, 'Death of a Placitum: The Fall and Fall of the Reference Power', Craven sought to explain why over the preceding 90 years this legislative power, pregnant with possibility for reshaping the federal system without recourse to the formidable referendum mechanism in s 128 of the Commonwealth Constitution, had 'been allowed largely to slumber on undisturbed'.² The reasons, he concluded, lay in the combination of ambiguity surrounding key aspects of the use of the power and an understandable lack of confidence on behalf of the states that its interpretation by the High Court would protect their interests.

Twenty-one years later, Craven's short comment is worth acknowledging in any fresh appraisal of the significance of the reference power found in s 51(xxxvii). In his doubt that there was 'any real future'³ for the power's exercise and his willingness to pronounce it as, essentially, dead, time has proved him spectacularly wrong. The contemporary importance of s 51(xxxvii) is evidenced by its role in the creation of laws of great national significance, notably mutual recognition of regulatory standards for goods and occupations,⁴ the regulation of corporate entities,⁵ the prevention of terrorism,⁶ and the industrial conditions of almost all Australians working in the private sector.⁷ In enacting laws in these

1 Greg Craven, 'Death of a Placitum: The Fall and Fall of the Reference Power' (1990) 1 *Public Law Review* 285.

2 *Ibid* 286.

3 *Ibid*.

4 *Mutual Recognition Act 1992* (Cth).

5 *Corporations Act 2001* (Cth) ('*Corporations Act*'); *Australian Securities and Investments Commission Act 2001* (Cth).

6 *Criminal Code* (Cth) Pt 5.3 Divs 100–103 ('*Criminal Code*').

7 *Fair Work Act 2009* (Cth).

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