THE REFERENCE POWER IN THE AUSTRALIAN CONSTITUTION

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[*The reference power, section 51 (37), concerns Commonwealth power over matters which the States or a State may choose to refer to the Commonwealth Parliament; matters over which the Commonwealth would otherwise have no constitutional power. In this article, Mr Johnson considers those references which have been made by the States and purports to explain why the States have not made more use of section 51 (37). He also analyses the many legal doubts which arise in connection with this section, some of which have been resolved by High Court decision, but many of which still cloud its precise nature. Finally, he posits a number of areas in which a reference of matters by the States may become beneficial and could be achieved.*]

I INTRODUCTION

> We do not know what we are handing over,
> we do not know to whom we are handing over
> what we hand over and we do not know how
> what we hand over will be used.[1]

The significance of section 51 (37) of the Constitution lies in its potential use—the way it could, and might, be used in the future—rather than its use in the past. At face value, section 51 (37) would appear to be a relatively easy means by which the powers of the Commonwealth Parliament could be enlarged, if the need arose. However, references of matters by the States have been few and Commonwealth legislation in reliance on a reference even scarcer.

HISTORY OF SECTION 51 (37)

Sir John Quick and Sir Robert Garran traced the genesis of section 51 (37) to midway through the last century.[2] Suffice it to say that the section was not unknown to Australian law and indeed had clear precedent in

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[1] Mr Steel Hall, South Australia, *Parliamentary Debates*, House of Assembly, 14 March 1967, 3658.

[2] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 648-9.

Section 15 of the Federal Council of Australasia Act 1885, which empowered the Federal Council, at the request of the legislatures of two or more of the colonies, to legislate concerning:

> (h) Any matter which at the request of the legislatures of the colonies Her Majesty by Order in Council shall think fit to refer to the Council:

Section 15 enumerated a number of matters, stated in general terms, which might be referred to the Council and continued:

> 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 matter shall have been so referred to it, and such other colonies as may afterwards adopt the same.

Not only is there a marked similarity with section 51 (37), but section 15 might also contain the reason or reasons for which section 51 (37) was inserted in the Constitution. The draft Constitution Bill debated in Sydney in 1891 contained a section 52 (30) which was substantially in the same form as section 51 (37), the only significant difference being the use of the word 'was' in the phrase 'by whose Parliament or Parliaments the matter was referred'. The present section contains the words: 'by whose Parliaments the matter *is* referred'.[3] Unfortunately the clause was not debated in 1891.

However, at the Melbourne Convention in 1898, considerable debate was forthcoming.[4] The conflicting opinions expressed at the Convention raised the same doubts, which remain with us today concerning section 51 (37). In light of the relatively small number of times the section has been used, it is interesting to note the opinion of one speaker, Mr Symon, who, in calling for the exclusion of the clause from the Constitution Bill, said:

> I do not think we ought to put it in the power of states to relieve themselves from their own responsibilities in legislation or administration by any such easy contrivance as this might turn out to be. I think the provision is really in by mistake.[5]

Despite some opposition, and suggested amendments to the clause,[6] clause 52 (35) was passed in a form similar to the corresponding clause in 1891 —that is, substantially in the form of section 51 (37).

[3] My emphasis. The inclusion of the alternative singular 'Parliament' in 1891 is not significant. The possible signficance of the substitution of 'is' for 'was' is canvassed *infra* n. 12.

[4] *Official Record of the Debates of the Australasian Federal Convention* (Third Session, January 1898), 215-25.

[5] *Ibid.* 219.

[6] *Ibid.* 222. Mr Isaacs proposed an amendment which would limit the power of reference to cases where two or more states desire to be bound by the federal authority. His proposal seems to have been simply ignored.

The reasons for the insertion of the clause can be gleaned from the Convention debates. Firstly, 'questions may afterwards arise which concern one, two, or three states, but which are not sufficiently great to require a complete revision of the whole Constitution',[7] or similarly 'if [a State] agrees with another State that some law, not to be of universal application throughout the Commonwealth, but to affect it and that other State alone, should be passed',[8] a reference could be made to the Commonwealth Parliament. Such a reference would be particularly applicable where State laws were limited to application within the boundary of the State. Secondly, a reference power was needed because 'there might be other matters of common concern, but that are not yet regarded as such or have not yet arisen in any way . . . [Q]uestions may arise that we do not foresee'.[9]

From the debates, it appears that it was felt necessary to include a provision which allowed for Commonwealth Parliamentary action when the other provisions of the Constitution proved inadequate, either because two or three States wanted to act in concert, but could not because of constitutional or territorial limitations, or because matters of common concern, which were unforeseen in 1898, had arisen. The reasons for its insertion will become clearer when the actual reference legislation which has been passed under the section is discussed.

In its present form, section 51 (37) is as follows:

> 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:—
>
> > [m]atters 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 final change from 'was' to 'is' was a last-minute, purely *drafting* amendment. Section 51 (37), containing the word 'was', was agreed to on 27 January 1898.[10] However, on the final day of actual business in Melbourne (16 March 1898) Mr Barton laid on the table a copy of the Commonwealth of Australia Bill as revised by the Drafting Committee. He said that there were 400 amendments, 'and we do not want a separate motion about every "the" and "but", and further that the Drafting Committee was "not conscious of having altered the sense of the intention of the committee" '.[11]

The proposed amendment by the Drafting Committee, involving the substitution of 'is' for 'was' was not discussed, and the Drafting Committee's

[7] *Ibid.* 220, 221. Sir John Downer.
[8] *Ibid.* 222. Mr Isaacs.
[9] *Ibid.*
[10] *Ibid.* 225.
[11] *Ibid.* 2444 (March 1898).

amendments in clauses 46-51 were agreed to *en bloc*.[12] The Constitution, incorporating the amendments, was finally adopted.[13]

REASONS FOR LACK OF REFERENCE.

In one sense this discussion may be premature in preceding the following section; and indeed the reasons why particular references were or were not made by the various States will obviously become apparent in that section. However, it is thought necessary to establish some framework, and collate possible motives before specific legislation is dealt with.

It is a matter of history that the States have been reluctant to refer matters to the Commonwealth. Twenty-three State Acts have been passed to refer matters of which only six still remain in force. Three 1931 Acts, in Victoria, Queensland and South Australia, referred the compulsory conversion of existing securities into new securities in accordance with the Commonwealth Debt Conversion Act 1931;[14] two referred the matter of air transport, one in Queensland in 1950,[15] and the other in Tasmania in 1952,[16] so as to allow Trans-Australia Airlines to conduct air services within those States. The sixth, and incidentally also the most recent, a 1966 Tasmanian reference[17] provided for the extension of the federal Trade Practices Act 1965-66 to the area of intra-state trade.

These are the only laws which have had an effective operation, and together it could not be said that they add substantially to Commonwealth legislative power. When it is further considered that eleven of the twenty-three Acts were wartime Commonwealth Powers Acts in 1942-3 or arose out of such Acts, and that the Commonwealth has passed only four Acts in reliance on State reference, it is readily seen that the significance of section 51 (37) does not lie in its past; it has not had a great effect on the division of legislative powers between Commonwealth and State.

Co-operation between the States and the Commonwealth has been evidenced in many areas since Federation, and it may be that the States have preferred this method of solving problems of legislative competence when Commonwealth powers have proved inadequate. Sir John Downer in 1898 stated that 'every state wants to aggrandize itself, to increase its authority, and it will only be in very extreme cases that the states will resort to this means of getting rid of a difficulty'.[18]

[12] *Ibid.* 2449.

[13] *Ibid.* 2465. I am indebted for this information on the change from 'was' to 'is' to Professor J. A. La Nauze, who in private correspondence corrected my initial impression that the change was inexplicable.

[14] Debt Conversion Agreement Act 1931 (No. 2) (Vic.); The Commonwealth Legislative Power Act 1931 (Qld); Commonwealth Legislative Power Act 1931 (S.A.).

[15] The Commonwealth Powers (Air Transport) Act of 1950 (Qld).

[16] Commonwealth Powers (Air Transport) Act 1952 (Tas.).

[17] Commonwealth Powers (Trade Practices) Act 1966 (Tas.).

[18] *Official Record of the Debates of the Australasian Federal Convention* (Third Session, January 1898), 221.

His comment is well made in the light of opinions expressed at times when references by the States have been contemplated. The unwillingness of the States to refer matters to the Commonwealth may be symptomatic of a desire to retain as many powers as possible and resist inroads by the Commonwealth into the State domain, and often a suggested reference has been seen simply as increasing the amount of power of the Commonwealth Parliament without a corresponding benefit to the States.[19]

It was suggested in 1951 that, prior to that date, the 'attempts made in the past to induce the States to refer powers to the Commonwealth were made on the basis of negotiation among seven roughly equal parties'.[20] However, because of the overwhelming financial dominance acquired by the Commonwealth in consequence of the Uniform Tax Case,[21] the States 'can no longer regard themselves as equal political partners with the Commonwealth', and it was predicted that in the future, when the political atmosphere would be favourable to the Commonwealth, it would not be difficult to induce the States to refer the necessary powers.

The more likely result, following the Uniform Tax Case,[22] would be a jealous entrenchment by the States, reluctant to release much more of their power to the Commonwealth. There is no evidence of Commonwealth financial pressure having been put on the States to induce them to refer matters, and the twenty years since the prediction was made have not seen a spate of reference legislation—only two referring Acts having been passed. Perhaps the political atmosphere is not yet favourable to an extension of Commonwealth power.

Sir Kenneth Bailey, also in 1951, posited one reason why section 51 (37) may have been little used: 'to paraphrase John Adam's apherism, "it is hard to make six clocks strike all at once" '.[23] In a number of areas, to be properly effective, the reference would have to be made on a national basis—by all the States. Awkward consequences would follow if only some States passed the necessary legislation. The Commonwealth would not be able to pass legislation for the purpose of any practical national planning, having received what has been referred to as 'a hotch-potch of powers'.[24]

To date, at no time, has a common Act been passed by all the States. In 1943, five States referred a series of matters to the Commonwealth, but the Acts differed between States. In 1931, three States passed the

[19] See, *e.g.*, the comment of New South Wales' Premier, Mr Holman, in New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 November 1915, 3799.
[20] Anderson, 'Reference of Powers by the States to the Commonwealth' (1951) 2 *University of Western Australia Annual Review* 1, 3.
[21] *South Australia v. Commonwealth* (1942) 65 C.L.R. 373.
[22] *Ibid.*
[23] Bailey, 'Fifty Years of the Australian Constitution' (1951) 25 *Australian Law Journal* 314, 335.
[24] Victoria, *Parliamentary Debates*, Legislative Assembly, 9 December 1942, 2092.

same legislation, and in 1920-1, there was some similarity between the State references of air navigation. A contributing factor to the lack of common action must be section 51 (37) itself, which lays down no guidelines for action—the mode of reference is not specified. It is left to the individual States to decide in what form the reference will be made, and there has been a tendency to wait and see if the other States refer the matter contemplated.

The far-reaching legal doubts concerning the nature of section 51 (37) have assumed such proportions that the States have preferred not to refer at all rather than refer an unknown quantity.

Doubts have arisen as to whether a reference could be in general terms; whether a reference could be limited in time, and if not, whether, if a time limit were included, the whole reference or only the time limit would thereby be invalidated; whether the reference could be made subject to some other condition; and most importantly, whether the reference once made is made for all time, or could be withdrawn by the referring State. Undoubtedly these legal uncertainties, and particularly the problem of revocation of a reference once made, which goes to the heart of the matter, have impeded the use of section 51 (37).[25]

II SECTION 51 (37) IN ACTION

STATE REFERENCES

In the majority of cases, reference legislation has not been passed by the States acting solely on their own initiative, but rather as a result of discussion and negotiation on the need for particular Commonwealth powers at Conferences of Commonwealth and State Ministers. Agreements to submit proposals to refer matters to State Parliaments have been made a number of times, but despite the agreements, the State Parliaments have not readily responded to the proposals.

The first reference of matters by a State Parliament to the Commonwealth was in 1915, when the New South Wales Parliament passed the Commonwealth Powers (War) Act 1915. This legislation arose out of a of desire to avoid a referendum planned by the Commonwealth Labour Government and justification of the Act in the New South Wales Parliament in 1915 was couched in terms of the referendum, and not based on the merits of the Bill *per se*.[26] Considerable debate took place on whether it was ever intended that section 51 (37) be used to affect an amendment of the Constitution, a point dealt with later.[27]

[25] These legal uncertainties appear in the discussion in Section II. An attempt to resolve them and others is made in Section III.

[26] New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 November 1915, 3799.

[27] See *infra* Section IV.

The Commonwealth Government had intended to hold a referendum in December 1915, which would have given the Commonwealth the right to control companies and regulate monopolies, and would have armed it with arbitration powers to control employment and unemployment, strikes and lockouts, and to settle industrial disputes. It was generally agreed that it was very undesirable to proceed with a referendum poll in wartime, 'at a time when the Empire was fighting for its existence'.[28] It was unwise to have political controversy and political struggle.

On a discussion which arose at a financial meeting of Premiers held in Melbourne in November, it was agreed that the Commonwealth would postpone the referendum, and that the Premiers would submit proposals to their respective Parliaments, the proposals being that the six States pass legislation referring the powers in question to the Commonwealth for the period of the war and a year after. The writs for the taking of the referendum were withdrawn.

New South Wales was the only State to pass any legislation and the Act carefully stated that Commonwealth power expired with the expiration of a 'period of twelve months after the declaration of peace'.[29] South Australia, Queensland and Victoria rejected similar Bills, and in Western Australia and Tasmania, one was introduced but was not proceeded with.

Clearly, there was a fear of aggrandizing the Commonwealth, a fear evident even in New South Wales, and the proposed referrals met with much opposition. It was strongly suggested that the aim of the Bill was merely to aggrandize the Federal Labour Party;[30] it was not for the utilization of the war because the Commonwealth Parliament had power to pass the necessary legislation under section 51 (6). Ironically, a section of the Labour Party opposed the scheme, predicting that the States would not legislate as required.[31] The significance of the 1915 proposals for reference simply lay in the precedent set for State scepticism about referring matters under section 51 (37), and doubts about the nature of the section.

In 1920, another attempt was made to grant powers to the Commonwealth Parliament by way of reference. Australia was party to an International Convention on Air Navigation which was signed in Paris in October, 1919. The Convention dealt with the main items deemed necessary for the control of air navigation, and laid down certain minimum requirements. To carry out throughout Australia the provisions of that Convention, or of any later International Convention, and to apply its

[28] Victoria, *Parliamentary Debates*, Legislative Assembly, 22 December 1915, 4468.
[29] Commonwealth Powers (War) Act 1915 (N.S.W.), s. 5.
[30] New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 November 1915, 3814.
[31] Sawer, *Australian Federal Politics and Law 1901-1929* (1956) 145.

principles not only to international, but also to internal flying in Australia, appeared to be a task for Commonwealth rather than State legislative authority.

The Constitution of the Commonwealth does not specifically refer to air navigation. A number of legal authorities maintained that the Commonwealth did possess this power through its trade and commerce power, and partly through its defence powers.[32] However, this point was not clear. What was clear was that it was desirable for the Commonwealth to have the necessary power over air navigation. It would be impossible to create artificial State boundaries in the air; a State could not confine aeroplanes within its own boundaries. Any regulation of air traffic would have to be uniform throughout Australia, otherwise there would be endless trouble so far as companies and pilots were concerned.

A Premiers' Conference in May 1920, recognized the need for Commonwealth control, and to avoid any doubts concerning existing Commonwealth power, resolved that the 'States should refer to the Parliament of the Commonwealth pursuant to section 51 (xxxvii) of the Commonwealth of Australia Constitution Act, the matter of the control of air navigation'.[33] The Premier of New South Wales was to draft and submit to the State Governments a Bill granting the necessary power to the Commonwealth Parliament, and providing for uniform action by the States, pending the passing of Commonwealth legislation. The only thing which would then have prevented the Commonwealth from having control over civil aviation would have been the objection of the States.

The Commonwealth Parliament passed the Air Navigation Act 1920 based, in part, on the understanding reached at the Premiers' Conference, but the States failed to respond as agreed. Owing to the failure of the States to take the necessary common legislative action, this Act was never proclaimed. Only Queensland[34] and Tasmania[35] passed Acts substantially in accordance with the terms of the Premiers' resolution; Victoria[36] and South Australia[37] passed Acts conferring much more limited power over air navigation; New South Wales and Western Australia failed to enact any legislation at all.

With the exception of the Tasmanian Act, none of the Acts came into operation. The Victorian Act was repealed in the Commonwealth Arrangements Act 1928; those in the other three States by Air Navigation Acts 1937. All States passed Acts in 1937 and 1938 in a further attempt

[32] Commonwealth, *Parliamentary Debates,* Senate, 4 November 1920, 6232.
[33] See *Report of the Royal Commission on the Constitution* (1929) 183.
[34] The Commonwealth Powers (Air Navigation) Act of 1921 (Qld).
[35] Commonwealth Powers (Air Navigation) Act 1920 (Tas.).
[36] Commonwealth Powers (Air Navigation) Act 1920.
[37] Commonwealth (Air Navigation) Act 1921 (S.A.).

to achieve uniformity in the control of air navigation,[38] but these Acts did not involve references under section 51 (37).

The attempt to refer air navigation to the Commonwealth highlighted the difficulties involved in using section 51 (37), and emphasized that, in certain areas, if any of the States refused to refer, the value of the references by the other States was rendered worthless. For effective Commonwealth legislation, which necessarily had to be uniform throughout Australia, all the States would have had to refer. In New South Wales, which in the end result did not pass legislation, an amendment to the Bill was passed in the Assembly. The amendment, 'that this bill should not come into operation until a similar bill has been passed by the other States',[39] would have ensured uniformity, but it was very negative in approach and simply reflected the caution with which the States approached the use of section 51 (37).

In 1928, the Victorian Parliament passed the Commonwealth Arrangements Act 1928, an Act to consolidate the law providing for certain matters in Victoria in connection with the Commonwealth. As mentioned, the Air Navigation Act 1920 (Vic.) was repealed; but Part III of the 1928 Act simply re-legislated the 1920 Act—in other words, there was a re-referral to the Commonwealth of the matters previously referred in 1920.

In August 1931, a conference was held with the Commonwealth Authorities in connection with the Premiers' Plan, the financial emergency, and debt adjustment. It was resolved that the small proportion of Government securities which had not been voluntarily converted pursuant to the Commonwealth Debt Conversion Act 1931, should be converted on the same terms and that legislative action should accordingly be taken. Victoria,[40] Queensland[41] and South Australia[42] subsequently referred 'the compulsory conversion of existing securities into new securities' to the Commonwealth Parliament. In this case, the Victorian Act provided that it should not come into operation until similar legislation had been passed by the Parliaments of the other States. These references require no further discussion.

The high water mark in the history of section 51 (37)—not only in terms of the volume of subject matter contemplated and the number of States who eventually passed legislation, but also in terms of the extensive debate which surrounded the references—arrived in 1942. As in 1915,

[38] *Airlines of New South Wales Pty Ltd v. The State of New South Wales and others (No. 1)* (1964) 113 C.L.R. 1, 35 *per* Taylor J.
[39] New South Wales, *Parliamentary Debates,* Legislative Assembly, 16 December 1920, 3809.
[40] Debt Conversion Agreement Act 1931 (No. 2).
[41] The Commonwealth Legislative Power Act, 1931 (Qld).
[42] Commonwealth Legislative Power Act, 1931 (S.A.).

section 51 (37) was invoked to avoid the holding of a referendum. The Commonwealth Government had initiated a proposal in 1942 to amend the Constitution by inserting a new section conferring power on the Commonwealth to make laws on a variety of subjects connected with economic and social re-construction after the war.

A Convention, consisting of twenty-four members, twelve representing all the parties in the Commonwealth Parliament, and the Premier and Leader of the Opposition from each of the six States met towards the end of the year to discuss the proposed amendment. As in 1915, it was thought inopportune to hold a referendum, a feeling which reflected itself in the resolution agreed to at the Convention. Having agreed that—

> (a) Adequate powers to make laws in relation to post-war reconstruction should be conferred in the Parliament of the Commonwealth;

the resolution continued—

> (b) It is undesirable that permanent alterations of the Constitution should be effected at this critical stage in Australia's history;
> (c) For this reason legislative power with respect to suitable additional matters in relation to post-war reconstruction should be referred to the Parliament of the Commonwealth by the Parliaments of the States under section 51 (xxxvii) of the Constitution;[43]

The reference was to last for five to seven years after the cessation of hostilities, after which time a referendum was to be held to place the alterations of the Constitution on a permanent basis.

The Convention agreed upon the list of subjects to be referred; and upon a Bill in common form to be introduced into the state legislatures. The draft Bill approved at the Convention covered some fourteen subject matters of legislation, namely: reinstatement and advancement of members of the forces, employment and unemployment, organised marketing and commodities, uniform company legislation; trusts, combines and monopolies; profiteering and prices; production and distribution of goods; control of overseas exchange and investment; air transport; uniformity of railway gauges, national works; national health, family allowances; aborigines.

The Bill contained a clause which was to be the subject of intense legal debate, a debate unresolved until 1964. Clause 4, in part, was as follows:

> [t]he reference made by this Act shall commence on the date upon which assented to, and shall continue in force for a period ending at the expiration of five years after Australia ceases to be engaged in hostilities in the present war.[44]

[43] Reported in Victoria, *Parliamentary Debates*, Legislative Assembly, 9 December 1942, 2089.

[44] 'Senex', 'Commonwealth Powers Bill: A Repletion of Opinions' (1943) 16 *Australian Law Journal* 323, 324.

The Premiers had undertaken to do their utmost to secure the passage of the Bill through their respective Parliaments, but the results of their efforts were only mediocre. Only New South Wales[45] and Queensland[46] passed Acts in accordance with the terms agreed on at the Convention. In Victoria, the Commonwealth Powers Act 1943 was passed which contained practically all the agreed conditions, but included a condition[47] that the Act was not to come into operation until 'legislation the same or substantially the same as this Act has been enacted in each of the other States of the Commonwealth'. Acts were passed in South Australia[48] and Western Australia[49] which departed from the approved draft in material respects—for example, in South Australia, the subject matters of uniform company legislation and trusts, combines and monopolies were deleted, while in Western Australia there was similarly no provision for uniform company legislation, but the matter of 'rationing of goods' was inserted.[50]

It is interesting to note that the Western Australian references triggered off a succession of reference legislation in that State. The Commonwealth Powers Act 1945, to last until 31 December 1947,[51] was passed to refer the matter of 'prices' which had been omitted in 1943. This particular reference was terminated by the Commonwealth Powers Act, 1945, Amendment Act, (No. 2) 1947, but later in that year the operation of the 1945 Act was extended for one year until 1948.[52] Two earlier Acts in 1947 had affected the references by deleting any mention of 'wheat' from the referring legislation.[53] This incredible network of legislation was never acted on by the Commonwealth and was repealed *in toto* in 1965 by the Statute Law Revision Act (No. 2) 1965.

One State, Tasmania, failed to pass any legislation in 1943. The stumbling block was the Legislative Council which rejected the proposed Bill ten votes to seven.[54] Such a small majority could prevent the implementation of a national scheme—one of the difficulties surrounding the implementation of section 51 (37) canvassed in Section 1. The Tasmanian experience in 1943 is also illustrative of most other factors involved in the lack of State references.

[45] Commonwealth Powers Act, 1943 (N.S.W.) which simply echoed the provisions of Commonwealth Powers Act, 1942 (N.S.W.).
[46] Commonwealth Powers Act, 1943 (Qld).
[47] S. 1 (2).
[48] Commonwealth Powers Act, 1943 (S.A.).
[49] Commonwealth Powers Act, 1943 (W.A.).
[50] *Ibid.* S. 2 (f).
[51] Commonwealth Powers Act, 1945 (W.A.), s. 6.
[52] Commonwealth Powers Act, 1945-1947, Amendment (Continuance) Act, 1947 (W.A.).
[53] Commonwealth Powers Act, 1943, Amendment Act, 1947 deleted 'wheat' from s. 2 (c) Commonwealth Powers Act, 1943 which had referred the matter of organized marketing of wheat, wool, meat and butter. Commonwealth Powers Act, 1945, Amendment Act, 1947, omitted 'wheat boards' from the operation of Commonwealth Powers Act, 1945.
[54] Victoria, *The Argus*, 4 February 1943, 1.

The Councillors who voted against the Bill evidenced an extreme caution and fear of the extension of Commonwealth power. The feeling was that the Federal Government had too much power already, and it had not carried out the powers it should have.[55]

> We would be handing over a blank cheque to the Commonwealth. It would be drawn on our bank, and we would have no say in the amount.[56]
> I feel certain that we will have a policy of nationalisation if the Commonwealth gets these powers, and that means the destruction of individuality, incentive, and independence.[57]

At one stage, the Legislative Council had adjourned to allow the Premier, Mr Cosgrove, and the Leader of the Opposition, Mr Baker, to address members in an endeavour to persuade the Council to pass the Bill.[58] When the Bill had been defeated, Cosgrove declared that the Bill had been rejected on political as distinct from national grounds, under pressure from powerful organizations outside Parliament, and actuated by mercenary motives.[59] However, it seemed Councillors feared the result of Tasmanian referral of the fourteen subject matters. One, Mr Ockerby, said the Bill, if passed, would hand Tasmania to the wolves and make the State a mere backwash.[60]

However, further attempts were made to pass the Bill. The Legislative Assembly agreed to refer the Commonwealth Powers Bill to a joint select committee of Parliament, but this suggestion was rejected by the Council, again by ten votes to seven.[61] There were suggestions of a plan to change the Constitution of the Council. Eventually, the Bill was re-introduced, passed by the Legislative Assembly, but 'killed' in the Council which agreed to the Bill being read six months later.[62]

The State Parliaments had thwarted the scheme for referring matters needed for reconstruction to the Commonwealth. Following this failure, the Commonwealth Parliament passed the Constitution Alteration (Post-War Reconstruction and Democratic Rights) Act 1944 which incorporated the substance of the draft Commonwealth Powers Bill, but, in addition, contained declarations relating to freedom of speech and religious freedom. Practical problems were involved in the holding of the referendum—a blanket vote to cover all points might offer difficulties to those who would be prepared to concede some points, but not others. On the other hand, if an answer had to be given separately, confusion would almost certainly result.

[55] Mr Darling, Reprinted from Tasmania, *The Mercury,* 20 January 1943, 2.
[56] *Ibid.* Mr Shoobridge. [57] *Ibid.* Mr Lillico.
[58] Tasmania, *The Mercury,* 21 January 1943.
[59] Victoria, *The Argus,* 4 February 1943, 1.
[60] Tasmania, *The Mercury,* 2 April 1943. Generally, the 'ten rejectors' shared the same view.
[61] Victoria, *The Argus,* 8 April 1943, 3. [62] Victoria, *The Argus,* 27 May 1943, 3.

These problems would have been avoided had section 51 (37) been invoked by all the States. In the referendum which was held on 19 August 1944, a blanket vote was required and predictably, there was a decisive 'No', only South Australia and Western Australia voting 'Yes'.[63]

The entire 1943 episode prompts the question of whether the Commonwealth Parliament needed extra powers to legislate with respect to the fourteen subjects mentioned in the Commonwealth Powers Bill. It possessed a defence power which did not cease to operate when the war ended. 'The sudden removal of all controls is not demanded by the collapse of enemy resistance.'[64] It also had extremely wide financial powers, giving the Commonwealth Parliament supremacy.

But the main reason for the desire of the Commonwealth to have the powers conferred on it then was the legal doubts surrounding the nature of its powers. On the cessation of hostilities, the war powers of the Commonwealth would be uncertain in character, duration and extent. It could not be said categorically whether the defence power would sustain a broad programme of post-war reconstruction. Further, the Commonwealth was obliged by international agreements, such as the International Wheat Agreement and the Mutual Aid Agreement to adopt measures or policies that might require greater powers of internal management than the Commonwealth possessed. The High Court had not fully defined the extent of the external affairs power.

This latter justification, given by Mr Dunstan, Premier of Victoria, when introducing the Bill, was rendered less forceful by the *Airlines'* case[65] which sanctioned Commonwealth projection, pursuant to its external affairs power, even into the area of intra-state air traffic. However, in 1943, the main authority, *R. v. Burgess: ex parte Henry*[66] had not sanctioned such interference, but merely stressed tests focusing on a mutuality or reciprocity of international interest and concern. In this case, the High Court also decided that the trade and commerce power did not empower the Commonwealth to exercise general control over civil aviation, including intra-state aviation. For the same reasons, the Commonwealth may have been limited in its power over the fourteen matters proposed in 1942. The very fact that there were doubts about the extent of Commonwealth power suggested the need for an alternative to merely using existing power. It was also urged that a national plan was necessary to channel defence operations once the war had finished, and that there was a widespread

[63] Victoria, *The Argus*, 21 August 1944, 1.
[64] *R. v. Foster* (1949) 79 C.L.R. 43, 84.
[65] *Airlines of New South Wales Pty Ltd v. The State of New South Wales and others (No 1)* (1964) 113 C.L.R. 1.
[66] (1936) 55 C.L.R. 608.

public demand for concerted planning so that the problems of post-war reconstruction could be successfully attacked.[67]

There was still no State-wide reference in 1943, at a time of war when all the Premiers and Leaders of the Opposition had agreed that a reference of matters to the Commonwealth was desirable. The repetitive fears of Commonwealth inroads on State domains and unnecessary extension of Commonwealth powers were again in evidence. There was a clear line of thought, that, in view of the many divergent legal opinions—and all governments sought the advice of eminent King's Counsels to clarify the legal uncertainties surrounding the proposed Bill—it was not really known what was proposed or how far the powers would be exercised.[68] The terms of reference themselves were in vague and general terms. In the case of Tasmania, the Attorney-General, Mr McDonald, in moving the second reading of the Bill in the Legislative Council, would not have helped its cause by saying that, although the Commonwealth Government had sufficient war powers, authority should be given to provide for a long term plan of rehabilitation,[69] thus raising the doubt as to whether the Commonwealth really needed additional powers at all.

The fate of the Commonwealth Powers Bill may have set the tune for future use of section 51 (37), because in the last twenty years, there have been only three Acts referring matters to the Commonwealth. In 1950, The Commonwealth Powers (Air Transport) Act of 1950 (Qld) came into operation immediately the Commonwealth Powers Act 1943 of Queensland ceased to be in force, and provided[70] that the matter of air transport was to be continued to be referred to the Parliament of the Commonwealth 'in extension of the period for which it was referred by the Commonwealth Powers Act 1943'. Tasmania, which had not passed the Commonwealth Powers Bill, referred the matter of air transport in the Commonwealth Powers (Air Transport) Act 1952. This Act was the subject of litigation in the *A.N.A.* case[71] in 1964.

Both the Queensland and Tasmanian Acts referred 'air navigation' to the Commonwealth Parliament in order to give Trans-Australia Airlines the opportunity to compete with Australian National Airways on intra-state services within the respective States, an operation which the Commonwealth[72] could not have carried out by relying on its trade and commerce power since section 51 (1) extends only to interstate trade and commerce, not matters intra-state.

[67] Victoria, *Parliamentary Debates*, Legislative Assembly, 9 December 1942, 2098 (Mr Dunstan).
[68] *Ibid.* 16 December 1943, 2285.
[69] Tasmania, *The Mercury*, 20 January 1943. [70] S. 3.
[71] *R. v. Public Vehicles Licensing Appeal Tribunal of the State of Tasmania and others; ex parte Australian National Airways Pty Ltd* (1964) 113 C.L.R. 207.
[72] T.A.A., a Commonwealth instrumentality, was debarred from operating in either State.

Because the other four States have not passed similar legislation, Trans-Australia Airlines is limited in those States to providing only linking services with the other States. It cannot, within the limits of the Constitution, conduct intra-state services.

The most recent Act referring matters to the Commonwealth is the Commonwealth Powers (Trade Practices) Act 1966 (Tas.). The relevant portions of section 2 of this Act are:

> S. 2—(1) . . . the following matters are referred to the Parliament of the Commonwealth, namely—
>
> (a) Agreements, arrangements, understandings, practices and acts restrictive of, or tending to restrict, competition in trade or commerce; and
>
> (b) The exercise or use by a person, or by a combination or member of a combination, in or in relation to trade or commerce, of power, influence or a position of advantage resulting from the extent of the share of that person or combination in some portion of trade or commerce.

The Commonwealth Trade Practices Act 1965-66, could have effect only in the area of interstate trade, while intra-state agreements and practices of a kind covered by the Commonwealth legislation would be left untouched by it. Whether the Act is to have full operation in any particular State is a matter for each State to consider. A State has two courses open to it. Firstly, it could take advantage of section 8 of the Commonwealth Act providing for appropriate State legislation to be declared complementary to the Commonwealth Act. Secondly, by an appropriate reference under section 51 (37), the Parliament of a State could enable the Commonwealth Trade Practices Act 1965-66 full operation in that State. The State practices that are brought within the Commonwealth's powers by the reference would be dealt with, together with the practices already dealt with by the Commonwealth Act, in one indivisible code contained in the Commonwealth legislation.[73]

Tasmania chose the second course, because of a doubt surrounding the conferment by the States on the Commonwealth Industrial Court of jurisdiction to deal with judicial matters arising under the State law. This doubt was raised by Mr A. Mason Q.C. (then Commonwealth Solicitor-General) who came to the conclusion that:

> [o]n the present state of the authorities, the question is an open one, but I am not confident that the High Court will hold that Chapter III of the Constitution would permit the vesting of State jurisdiction in a Commonwealth Court.[74]

[73] Commonwealth, *Parliamentary Debates,* House of Representatives, 20 April 1967, 1558 (Attorney-General Bowen introducing Trade Practices Act 1967, which amended the original Trade Practices Act to incorporate the Tasmanian reference). The distinctions between reference legislation and complementary legislation will be made clear in Section IV.

[74] Second reading notes prepared for the Commonwealth Powers (Trade Prac-

Because of this doubt, and it is a very substantial one, the Tasmanian Government decided that the only safe approach was to refer under section 51 (37) the power to legislate in this area, and the Bill was subsequently passed. To this date, Tasmania is the only State which has referred the necessary matters to the Commonwealth.

In 1967, an attempt was made in South Australia to pass similar legislation to that already passed in Tasmania. The Bill passed through the Assembly; however, the Legislative Council amended the Bill to provide that it would not come into force until all other Australian States had passed similar legislation. Once again, the revocation arguments were to the fore in the debate.[75] The Bill was reintroduced in November, 1970, again passed through the House of Assembly, but was laid aside on 2nd December, 1970, in the Legislative Council because no agreement could be reached. The stubborn resistance of the Council is reminiscent of the Tasmanian Legislative Council in 1943.

A resolution of the Victorian State Council of the Liberal Party on 2nd March, 1967, called for State legislation to complement the Federal Trade Practices Act,[76] but as yet no legislation has been forthcoming. Mr Bowen, Commonwealth Attorney-General in 1967, expressed the view that legislation from New South Wales, Queensland and Western Australia was unlikely as those States had shown 'negative results in terms of co-operation'.[77] Since then, the Western Australian Government, in reply to a Parliamentary question regarding its intention to pass legislation complementary to the Commonwealth Act, indicated that it did not favour the Commonwealth's Restrictive Trade Practices legislation.[78] There is no evidence of action in New South Wales or Queensland.

The Trade Practices Bills differ from other Bills referred to earlier in this section, in that the States were not agreed on the form of legislation, whether complementary or by reference. They may also be different because of the motives behind the passing of such legislation. It was suggested in the Federal Parliament in 1971 that 'only Labor in this Parliament or the State Parliaments had tried to secure effective laws'.[79]

There is strong evidence to suggest that the reasons behind the lack of reference are political, and do not arise from the legal or 'Commonwealth-

tices) Bill, 8 November 1966, Tasmania. Mr Mason's doubt is also referred to in South Australia, *Parliamentary Debates,* Legislative Council, 16 March 1967, 3748.

[75] See South Australia, *Parliamentary Debates,* House of Assembly 1 March 1967, 3354, 3356-7, 3661-2.

[76] Commonwealth, *Parliamentary Debates,* House of Representatives, 9 May 1967, 1904.

[77] *Ibid.* 1905.

[78] Western Australia, *Parliamentary Debates,* Legislative Assembly, 1 September 1970, 499.

[79] Commonwealth, *Parliamentary Debates,* House of Representatives, 18 December 1971, 278.

State power' controversy. The Labour Party in the Federal Parliament tried to enact a Bill; the Reese Labour Government in Tasmania referred the necessary powers to the Commonwealth; the Walsh Labour Government in South Australia passed a Bill in the House of Assembly, but the Liberal majority in the Legislative Council rejected it.

This evidence stands contrary to the prediction of Professor Anderson that when the political climate is favourable to the Commonwealth it would not be difficult to induce the States to refer the necessary matters. One would have thought, in his terms of Commonwealth financial dominance, that if ever the climate was favourable, it was now. However, the lack of reference legislation may be symptomatic of State defiance of the Commonwealth's dominance or at least a reluctance to allow the Commonwealth Parliament to further decrease State autonomy.

Except in the isolated instances detailed above, the States have been unwilling to refer matters to the Commonwealth, and there has been a tendency to wait to see what the next State does, a tendency evidenced by sections in referring Bills which make the legislation conditional upon the other States passing similar legislation. Even in 1970, there was an undercurrent in the South Australian debate that South Australia should not be the only mainland State to refer the trade practice matters to the Commonwealth, if only for the reason that it would put her at a disadvantage with her competitors.

COMMONWEALTH LEGISLATION

Commonwealth legislation in reliance on a reference of matters from the States has been scarce. Where it has been seen fit to pass a law with application only to the State or States which have referred the matter, legislation has been passed. But often Commonwealth response would have been futile, for the simple reason that it was necessary for all the States to make references. This occurred in 1920. The Federal Parliament passed the Air Navigation Act 1920 which was never proclaimed because of the failure of the States to pass the necessary legislation.

In 1947, the Australian National Airlines Act 1945 was amended. Section 19A was inserted by Australian National Airlines Act 1947, section 5, which authorized the Australian National Airlines Commission to establish airline services in any State which had referred the matter of air transport to the Commonwealth. Air transport had been referred in the Commonwealth Powers Act (1943) (N.S.W.) and the Commonwealth Powers Act of 1943 (Qld) and airline services were established in New South Wales and Queensland.[80] It was also referred by the Victorian Act, but that Act was subject to the condition that all the other States passed similar legislation. As they did not, the reference was ineffective.

[80] The reference of air transport was extended by the Commonwealth Powers (Air Transport) Act of 1950 when the Commonwealth Powers Act of 1943 expired.

By the Liquid Fuel (Rationing) Act 1949, the Commonwealth Parliament reintroduced petrol rationing, after the previous regulations were held invalid. These regulations were originally made under the National Security Act 1939-40 and were continued in operation after the war year by year by the Defence (Transitional Provisions) Acts 1946, 1947 and 1948. The High Court in *Wagner v. Gall*[81] held that these yearly Acts were invalid, because the connection between rationing and defence was too remote. According to the court 'it cannot be held that any action taken to deal with a matter which is a war consequence can be supported under the defence power'.[82] Incidentally, this decision confirms doubts that were held concerning the extent of the Commonwealth's defence power in 1942.

A series of conferences of Commonwealth and State Ministers was held, and at the third Conference, the Premiers unanimously agreed that if rationing of petrol became necessary, its imposition was a matter for determination by the Australian Government.[83] New South Wales, Queensland and Western Australia had already referred powers to the Commonwealth, and had no objection to their exercise. New South Wales and Queensland in 1943 referred the matter of 'the distribution of goods' and Western Australia that of 'the rationing of goods declared to be scarce'.

The Liquid Fuel (Rationing) Act 1949 automatically applied to those States which had made the necessary referral in 1943. Victoria, South Australia and Tasmania agreed to pass the necessary legislation for adoption of the Commonwealth Act as State law within the terms of section 51 (37). Victoria[84] and South Australia[85] did in fact pass legislation; they did not refer the matter to the Commonwealth, but rather adopted the Commonwealth Act to give that Act the force of State law.

It is interesting that even the three States which had referred the necessary matter to the Commonwealth also passed precautionary legislation to give the Commonwealth regulations the force of State law, in case they were invalid as Federal law.[86] Apparently, they feared hostile interests might challenge the Commonwealth Powers Acts, and in so doing obtain an injunction from the High Court restraining the Commonwealth from putting rationing into operation until the determination of the case.[87] Such fear emphasizes the need to clear up all the legal doubts related with Section 51 (37) before the States will be prepared to refer matters readily in the future.

[81] (1949) 79 C.L.R. 43. [82] *Ibid.* 91.
[83] Commonwealth, *Parliamentary Debates*, Senate, 21 October 1949, 1808.
[84] Liquid Fuel Act 1949. [85] Liquid Fuel Act 1949 (S.A.).
[86] Liquid Fuel Act 1949 (N.S.W.); Liquid Fuel Act of 1949 (Qld); Liquid Fuel (Emergency Provisions) Act 1949 (W.A.).
[87] Anderson, *op. cit.* 3.

The fourth Commonwealth Act, the Trade Practices Act 1967, was passed to amend the Trade Practices Act 1965-67 to incorporate the Tasmanian reference, mentioned earlier, in the Commonwealth Powers (Trade Practices) Act 1966. The Commonwealth Act now operates in relation to intra-state practices in Tasmania.

The lack of Commonwealth legislation can be explained most simply by the lack of opportunity the States have given the Commonwealth. Stress has been laid on the lack of use of section 51 (37) by the States, and a large cause has been the uncertain meaning of the section itself, and more particularly, of the effect and extent of a reference made under it. These and other legal implications of section 51 (37) are dealt with in Section III.

III LEGAL RAMIFICATIONS OF SECTION 51 (37)

In 1898, Alfred Deakin observed:

> [i]t 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.[88]

This need still exists. A lot of doubts still surround the operation of section 51 (37), doubts which can only be authoritatively erased by the High Court.

The *Engineers'* case[89] laid down the principles of interpretation of the Constitution, which principles require a broad construction of section 51 (37). A broad construction has two ramifications—firstly, a State Parliament can refer what it likes in what manner it likes; secondly, full discretion is left to the Commonwealth Parliament as to the way in which it may deal with the matter.[90] The broader the construction of the section, the greater the inherent legal difficulties. An attempt is made in this section to establish the limits within which section 51 (37) operates.

Section 51 (37) may involve a gap in power. There is no express power in State Constitutions to refer matters to the Federal Parliament; nor is there an implied power. One is forced to look to the Constitution of the Commonwealth and the only power which can be implied, as there is no express grant of power to the States, is that in section 51 (37).

If section 51 (37) is a grant of power to refer, it is given in a very oblique, unusual and ambiguous way. The section seems to assume that

[88] *Official Record of the Debates of the Australasian Federal Convention* (1898), 217.
[89] *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.
[90] Anderson, *op. cit.* 4.

there is power in the State Parliaments to refer, and that, subsequently, the Commonwealth Parliament can legislate accordingly. The view that there *is* a gap of power is strengthened if one looks at section 111 of the Constitution, which refers to the surrender of territory by a State. In that section the power is expressly given to the States.

For section 51 (37) to have any substance at all, an implication of power in the States to refer must be assumed. But the doubt still remains as to why there is no specific grant of power.

MEANING OF SECTION 51 (37)

The meaning of the particular terms used in section 51 (37) has to some extent been clarified by the High Court.

In 1915, it was suggested that section 51 (37) contemplated matters other than those already stated in the preceding thirty-six paragraphs of section 51.[91] Latham C.J. took this point up in *Graham v. Paterson*[92] by saying 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'.[93] This point would appear basic to the operation of section 51 (37).

The High Court further elucidated the term 'matter' in 1964. In the *A.N.A.* case,[94] it was argued *inter alia* that a State has power under section 51 (37) to refer only a specific law to the Commonwealth, and that the reference must set out the law which the Commonwealth is empowered to make.[95] The Court,[96] in a joint judgment, disposed of this contention. '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'.[97] It seems clear then that a 'matter' can be couched in general terms and that the State Parliament can define the 'matter' it wishes to refer. 'Matter' simply refers to the subject of the reference which need not be specific.

The two State actions contemplated in section 51 (37)—referral and adoption—have also been considered by the High Court. The gloss put on the word 'referred' could be important in determining whether or not a reference is revocable. In *Graham v. Paterson,* counsel argued variously that 'refer' did not mean 'exclusively hand over';[98] that it meant the denomination of the 'matter',[99] or that it meant a delegation of something. It described the act of delegating or empowering the Commonwealth to legislate upon a particular subject.[1]

[91] New South Wales, *Parliamentary Debates,* Legislative Assembly, 10 December 1915, 4516.
[92] (1950) 81 C.L.R. 1.
[93] *Ibid.* 19.
[94] (1964) 113 C.L.R. 207.
[95] *Ibid.* 210.
[96] Dixon C.J., Kitto, Taylor, Menzies, Windeyer, Owen JJ.
[97] (1964) 113 C.L.R. 207, 225.
[98] (1950) 81 C.L.R. 1, 11.
[99] *Ibid.*
[1] *Ibid.* 13.

McTiernan J. thought that 'denominated' did not correctly state the meaning of 'referred', and followed the ordinary meaning of 'refer' in the Oxford Dictionary—'to commit, submit, hand over (a question, cause or matter) to some special or ultimate authority for consideration, decision, execution'.[2] The other judges did not make a direct comment on the meaning of 'referred', but the tone of their judgments, in consonance with the above meanings, indicate that, whatever its exact meaning, a referral is not a transfer. The fact that the Court held that reference did not involve an exclusive grant of power to the Commonwealth is significant.

The act of adoption is clearer. The words 'which afterwards adopt the law' do not relate to the reference by a State or States, but refer 'to the law made by the Parliament of the Commonwealth in pursuance of a reference of a matter'.[3] An adopting State would still retain all its previous powers of legislation, and the Commonwealth legislation adopted would invalidate the legislation of that State only to the extent to which the two laws were inconsistent in accordance with section 109 of the Constitution. Adoption should be regarded as bringing the Commonwealth law into operation in the adopting State as a law of the Commonwealth.

Professor Anderson has claimed that adopting a Commonwealth law achieves the same result as referring a matter to the Commonwealth, and that by adoption the Commonwealth Act is given the force of State law.[4] A basic flaw in his argument is that he ignores the fact that the Commonwealth legislation must be derived from a head of power, and that section 51 (37) only contemplates adoption of laws made in reliance on a reference by a State or States, not adoption of any Commonwealth law. Following a reference, the Commonwealth Parliament has power to make laws concerning the matter referred. In other words, a Commonwealth law is made, and if adopted, must be adopted as such. The result is quite divorced from referring a matter to the Commonwealth.

Section 51 (37) prevents the Commonwealth law applying to the whole Commonwealth; the law will be limited in its area of application to the particular State which refers the matter legislated upon, or later adopts the law passed. Commonwealth Parliament acts like a State Parliament whose laws are confined within the borders of the State. Nevertheless, it is a Commonwealth law. A State may limit the matter referred; but it cannot set bounds on the Commonwealth's power to legislate on that matter. And the Commonwealth Parliament is free to choose whether to legislate on the referred matter or not, and may legislate within the terms of reference. To that extent, the Commonwealth's power is plenary.

[2] *Ibid.* 21.
[3] *A.N.A.* Case (1964) 113 C.L.R. 207, 225.
[4] Else-Mitchell (ed.), *Essays on the Australian Constitution* (2nd ed. 1961) 113.

When a State refers a matter, a new power arises in the Commonwealth Parliament, subject to the special conditions in section 51 (37). It is not a State legislative power that has become vested in the Commonwealth.[5] But it is also subject to all the restrictions imposed by the Commonwealth Constitution upon the exercise of Commonwealth legislative power. 'Each provision of the Constitution should be . . . construed and applied in the light of other provisions of the Constitution. Thus an endeavour should be made to, reconcile the respective powers . . . and give effect to all.'[6] Indeed, section 51 expressly states that 'The Parliament shall, *subject to this Constitution,* have power . . .'[7]

Commonwealth legislation is clearly subject to such restrictions as are imposed by sections 92 and 116, but it is still not subject to the kind of restrictions to which a State Parliament would be if it passed a law on the referred matter.

Of particular interest is the relation between section 51 (37) and section 99. Conceivably, a Commonwealth law in pursuance of the former section could regulate 'trade, commerce or revenue', in the terms of section 99. That section prohibits a preference to one State or part thereof over 'another' State or part thereof.[8] A preferential law must confer a preference which is tangible, definite and commercial, or is given in connection with commercial dealings.[9] No Commonwealth legislation passed in reliance on section 51 (37) has been outlawed because it infringed section 99, but future legislation may fall into this category, if indeed past legislation has not already done so.[10]

The High Court has not clearly established what is a tangible and definite preference. In *James v. The Commonwealth,*[11] Commonwealth regulations designated Dried Fruits Boards only in New South Wales, Victoria, South Australia and Western Australia, and were outlawed by section 99 because, on their face, they preferred these four States. However, in *Elliott v. The Commonwealth,*[12] it was held that no preference was involved in a federal licensing system for the employment of seamen which did not operate in Tasmania or Western Australia.

The position is not clear. It may be that section 51 (37), which does not relate to a particular head of power, but rather to a means by which

[5] *Graham v. Paterson* (1950) 81 C.L.R. 1, 21-2 *per* McTiernan J.
[6] *Bank of New South Wales v. The Commonwealth* (1948) 76 C.L.R. 1, 185 *per* Latham C.J.
[7] My emphasis.
[8] *Elliott v. The Commonwealth* (1936) 54 C.L.R. 657, 689-90.
[9] *Ibid.* 669-71, 679-80, 683.
[10] An argument might be sustained that the Commonwealth Liquid Fuel (Rationing) Act 1949 involved a preference to the States to which it applied; or conversely preferred Tasmania to which the law did not apply because interests in that State were not subject to the rationing regulations. Similarly, the Trade Practices Act 1965-1967, which applies only to Tasmania.
[11] (1928) 41 C.L.R. 442.
[12] (1936) 54 C.L.R. 657.

powers may be received from the States, stands apart from other Commonwealth legislative powers. Professor Sawer raises doubts about the connection between section 51 (37) and section 99, by the use of a specific example:

> if one State refers power to license the sale of petroleum, and the Commonwealth legislates under the reference in terms applicable to all States, but operating only in the referring State will this be a preference prohibited by section 99?[13]

No conclusive answer can be given.

EXTENT OF REFERENCE

It has been clearly established in the High Court that a reference does not involve an exclusive grant of power to the Commonwealth. In *Graham v. Paterson* the High Court clearly stated that a reference of matters does not deprive a State Parliament of power to make laws with respect to the same matters,[14] and that the Commonwealth power based on the reference is a power concurrent with the power of the State to legislate with respect to the referred matters.[15]

In that case, the appellant was charged under section 43 of The Profiteering Prevention Act of 1948 (Q'ld), which provided that a person shall not sell any declared goods at a greater price than the maximum price fixed in relation to those goods. He contended that the Act was an amendment of the Commonwealth Powers Act of 1943 (Q'ld) and was not passed in accordance with section 3 of that Act, which provided that the Act shall not be repealed or amended except with the approval of a majority of the electors voting on the question whether a Bill for an Act should be approved or not. Under section 2 (f) of the earlier Act, Queensland had referred the matter of 'Profiteering and prices . . .'

The appeal was unanimously dismissed—the Queensland Parliament still had power to legislate on the particular matter referred. *A fortiori,* an Act of the State Parliament dealing with a matter already referred to the Commonwealth Parliament is not a revocation of that reference—the State Act does not amend the referring legislation. The Judges relied heavily on the fact that paragraph (37) was placed in section 51, which contained concurrent powers (except for those which could not belong to the States), and that if it were intended to confer exclusive power on the Commonwealth, it would have been placed in section 52.[16]

State Parliaments may therefore continue to deal with matters they have referred, subject, of course, to section 109 of the Constitution. If the

[13] Sawer, 'Some Legal Assumptions of Constitutional Change' (1957) 4 *University of Western Australia Annual Law Review* 1, 12.
[14] (1950) 81 C.L.R. 1, 20 *per* Latham C.J.
[15] *Ibid.* 22 *per* McTiernan J.
[16] *Ibid.* 19 *per* Latham C.J.; 24 *per* Williams J.; 25 *per* Webb J.

Commonwealth Parliament exercises its power under section 51 (37), the Commonwealth law will prevail over a State law, and the latter, to the extent of the inconsistency, will be invalid.

In *Airlines of New South Wales Pty Ltd v. The State of New South Wales and Others (No. 1)*,[17] an action was brought to restrain the implementation by the State of a policy of re-allocating air routes within New South Wales which would operate adversely to the plaintiff. He submitted that the provisions of the State Transport (Co-ordination) Act 1931-1956 under which the re-allocation was to be effected, were, pursuant to section 109 of the Constitution, invalid for inconsistency with the Air Navigation Act 1920 (Cth). The Court unanimously decided that there was no such inconsistency. The States still had power over intra-state air transport. Taylor J. regarded the Commonwealth and State regulations as complementary sets of legislation designed to operate in their respective fields.[18]

The States definitely cannot cause exclusive power to beset the Commonwealth Parliament by a reference of matters. However, a problem might arise if the Commonwealth legislates so as to 'cover the field'.[19] If it were held that the State could not revoke its reference, a point discussed later, the Commonwealth law would virtually take effect as an exclusive power, the States being powerless to remove it.

An interesting question in relation to section 51 (37) is how much a State can refer. After the *A.N.A.* case,[20] it is clear that a reference can be made in general terms, but could a State refer all the matters over which it has power? In other words, could a State abdicate its authority by a 'mass reference' under section 51 (37)? It is not necessary to go to the State Constitutions to answer this question, although if reliance were placed on section 106 of the Commonwealth Constitution to answer the question in the negative, this would be necessary.

By section 106, the Commonwealth Constitution preserves the Constitutions of the States 'subject to this Constitution', and by section 107, provides for the continuance of every legislative power of a State 'unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the States'. In *Graham v. Paterson,* Williams J. relied on both sections to establish that the Commonwealth acquires only a concurrent power over matters referred to it;[21] Latham C.J.[22] and McTiernan J.[23] both relied on section 107, Latham C.J. expressly stating that section 51 (37) did not cause a power

[17] (1964) 113 C.L.R. 1.
[18] *Ibid.* 42.
[19] *Clyde Engineering Co. Ltd v. Cowburn* (1926) 37 C.L.R. 466.
[20] (1964) 113 C.L.R. 207.
[21] (1950) 81 C.L.R. 1, 24-5.
[22] *Ibid.* 19.
[23] *Ibid.* 22.

of a State Parliament to exclusively vest in the Commonwealth Parliament or be withdrawn from the State Parliament.

However, too much reliance cannot be placed on these sections, particularly section 107, in preventing the States from referring all matters in their domain to the Commonwealth. Section 107 is not read as a positive grant of power over State matters which are to be set against, and to limit in advance, a list of Commonwealth matters.[24] To read section 107 as other than a mere negative declaration was expressly rejected in the *Engineers'* case as 'a fundamental and fatal error'.[25] The section does not cut down Commonwealth powers.[26]

> The question under s. 51 is always whether a particular enactment is within Commonwealth power. It is never whether it invades a State's domain.[27]

A similar construction must be placed on section 51 (37), and consequently, arguments relying on the federal nature of the Constitution, involving a dual system of government, are not conclusive, albeit that if all the States referred everything away to the Commonwealth, Australia would have a unitary system of government. Better reasons, referable particularly to section 51 (37), present themselves to negate the question posed, than that of the theme of the federal balance of power divided between the Commonwealth and the States, which has recurred from time to time in High Court judgments.[28]

In consonance with *Graham v. Paterson,*[29] which established that powers of the State Parliament are not diminished when an Act is passed to refer a matter under section 51 (37), a State could not refer away all its powers. The nature of the powers involved under the section is one of concurrence—a State cannot refer matters to the Commonwealth so as to give it exclusive power.

The Commonwealth Constitution does not contemplate an abdication of powers by a State. It does provide, in sections 122 and 123, for the conversion of a Territory, or a part thereof, into a State, the alteration of State boundaries, and the surrender of State territory to the Commonwealth. There is no section providing for the conversion of a State into a Territory. However, such acts involve the geography of a State, not its

[24] Lane, *The Australian Federal System with United States Analogues* (1972) 272-3.
[25] (1920) 28 C.L.R. 129, 154.
[26] *Australian Steamships Ltd v. Malcolm* (1914) 19 C.L.R. 298, 330 *per* Isaacs J.
[27] *State of Victoria v. The Commonwealth* (1971) 122 C.L.R. 353, 400 *per* Windeyer J.
[28] *Andews v. Howell* (1941) 65 C.L.R. 255, 273; *Bank of New South Wales v. The Commonwealth* (1948) 76 C.L.R. 1, 184-5; *R. v. Foster* (1949) 79 C.L.R. 43, 83; *Airlines* case (1964) 113 C.L.R. 54, 115.
[29] (1950) 81 C.L.R. 1.

legislative powers. The question does not assume great practical importance as it is unforeseeable that any State would wish to refer all its 'powers' to the Commonwealth. Theoretically, it would appear that such a referral would not be possible.

MODE OF REFERENCE

A State is able to define the limits of the matter(s) referred, but a lot of doubt has been expressed as to whether it can make a conditional reference. Section 51 (37) contains no limits to be applied to a reference, but it also does not state that a reference has to be absolute. There would appear no bar to attaching some condition to the reference. It was mooted in 1943 whether the Victorian Commonwealth Powers Act 1943 was a valid law, when it contained a section declaring that the Act was only to come into operation when the Governor-in-Council was satisfied that similar legislation had been enacted in the other States. When one observes sections 2 (1) and (2) of the Commonwealth and States Financial Agreement Act 1927 (Vic.), which delayed its operation until the Governor-in-Council was satisfied that the other Parliaments had passed an Act approving the Agreement, the doubt is largely removed.

The main issue in debate has been whether a reference may include a time limit. Assuming the inclusion of a limit of a period of time placed on the reference, there are three possible legal results: firstly, the granting of a time limit may have the effect of making the whole reference nugatory, if the reference of matters and the time limit were held not to be separate; secondly, the time limit alone may be void, in which case the referral of matters would be effective notwithstanding the limitation; a corollary of this result might be that the grant becomes permanent in the Constitution; or thirdly, the time limit is valid and the reference would cease to support Commonwealth law at the end of the prescribed period.

These three results were crystallized in opinions expressed about clause 4 of the Commonwealth Powers Bills in 1943 which stated—

> [t]he reference made by this Act shall commence on the date upon which it is assented to, and shall continue in force for a period ending at the expiration of five years after Australia ceases to be engaged in hostilities in the present war; and no law made by the Parliament of the Commonwealth with respect to matters referred to it by this Act shall continue to have any force or effect, by virtue of this Act or the reference made by this Act, after the expiration of that period.

The first result was contemplated by some, but did not gain much support. The second was adopted by Ham K.C. and Fullagar K.C. who maintained that only a permanent transference could be effected under section 51 (37).[30] If the time limitation were held to be good, in their

[30] Victoria, *The Argus,* 15 January 1943, 3.

opinion, Commonwealth legislation passed during the period of limitation would continue to operate.[31] So no matter whether the time limit was void or valid, it was ineffective to limit Commonwealth powers to a period of five years after the war.

The Commonwealth legal advisers (Sir Robert Garran, K.C., Sir George Knowles and Professor K. H. Bailey) favoured the third result, that a reference could be limited in time.

> Any Commonwealth enactment depending for its validity on the support of the matter referred would, after the expiriation of that period, be left without that support, and would automatically become null and void just as would any other Commonwealth enactment not within the specific powers of the Commonwealth Parliament. That, and nothing else, is meant by the words in clause 4 of the Bill.[32]

The Victorian Parliamentary Draftsman of the time whimsically remarked that if Commonwealth legislation did continue to operate unsupported at the expiration of the period, 'that could only be regarded as a miracle of legal levitation or a kind of constitutional variation of the fabulous Indian Rope Trick'.[33]

In the *Airlines'* case, Windeyer J. stated that although it was unnecessary to decide whether a reference could be for a limited time only, 'I incline to the view, which appears to have been accepted, that it can be; and that, therefore, the Commonwealth Powers Acts passed in 1943 in New South Wales, South Australia, Western Australia and Queensland were valid and effective enactments'.[34]

The question confronted the High Court in the *A.N.A.* case,[35] in which the Commonwealth Powers (Air Transport) Act 1952 of Tasmania, in section 3, provided that the Governor could 'at any time, by proclamation, fix a date on which this Act shall cease to be in force, and this Act shall cease to be in force accordingly on the date so fixed'. It was argued that section 51 (37) contemplates a once-for-all reference and not a reference limited in time such as that attempted by the Tasmanian Act. This argument was rejected by the High Court which felt that how long the enactment is to remain in force as a reference may be expressed in the enactment.

> 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.[36]

[31] 'Senex', *op. cit.* 326.
[32] Victoria, *Parliamentary Debates*, Legislative Assembly, 26 January 1943, 2570.
[33] 'Senex', *op. cit.* 326.
[34] (1964) 113 C.L.R. 1, 52.
[35] (1964) 113 C.L.R. 207.
[36] *Ibid.* 226.

Thus it can be categorically stated that a State can refer matters for a limited time or on a defeasible condition.[37] The effect on Commonwealth legislation of the expiration of the period was not specifically dealt with by the Court, but it must be assumed that, the basis of the legislation having been removed, the Commonwealth law would be void.

REVOCATION OF REFERENCE

The Commonwealth Parliament does not receive exclusive power over a matter referred to it,[38] but where a Commonwealth law and a State law conflict, under section 109, to the extent of the inconsistency, the State law goes into abeyance, until such time as the Commonwealth chooses to repeal its law. Section 109 can aid the extension of Commonwealth powers which are shared concurrently with the States; if it happened that, once a State had referred matters to the Commonwealth, it could not revoke that reference, the State would virtually be excluded from the particular area, if a Commonwealth law which covered the field was in existence.

For reasons such as this, it is vitally important to ascertain whether a State can in fact revoke a reference it has made, a question which goes to the heart of section 51 (37). If a reference were irrevocable it would involve a big 'transfer' of power to the Commonwealth; and this doubt is possibly the most decisive reason for the lack of reference legislation.

Three stands have been taken on the question: a reference is revocable; it is irrevocable; or it can be revoked until the Commonwealth acts on it and passes legislation. All three viewpoints were put forward by speakers at the 1898 Convention. The third viewpoint which has least support and can be easily dealt with, is asserted, among others, by Wynes.

A reference cannot be revoked after it has been acted upon by the Commonwealth 'since an Act passed in accordance with this paragraph becomes binding in respect of the referring or adopting State as a law of the Commonwealth to which supremacy and binding force are attached by section 109 and Clause V of the Covering Clauses of the Constitution'.[39] Upon the expiration or repeal of the Commonwealth legislation, the reference could clearly be withdrawn. This view does not find support in the section; and further it is very doubtful whether section 109 covers a situation of inconsistency between a State Act repealing a reference and a Commonwealth law under the reference.[40] The Acts would not concern

[37] The Commonwealth Powers (Trade Practices) Act 1966 (Tas.) s. 4 allows the Governor to name a date for the expiration of the Act or to declare that the reference is to continue without limitation of time and shall only terminate when the Act is repealed.

[38] *Graham v. Paterson* (1950) 81 C.L.R. 1.

[39] Wynes, *Legislative, Executive and Judicial Powers in Australia* (3rd ed. 1970) 161.

[40] See Anderson, *op. cit.* 9; Sawer, 'Some Legal Assumptions of Constitutional Change' (1957) 4 *University of Western Australia Annual Law Review* 1, 11.

the same thing—section 109 only comes into play when a State legislates in the same area as a Commonwealth law based on a reference.

The case against revocation was forcibly put by Wilbur Ham, K.C. in a legal opinion in 1942.

> As soon as the State Act is duly passed the 'reference' takes place, and thereafter it is a fact which has happened. It cannot be said 'to continue in force' [for its force is expended in making the reference]. It is a concluded result. The State Parliament could not revoke or cancel or destroy or affect it in any way.[41]

According to this view the Commonwealth power does not depend on the continuance of the State Act, and the State can only regain its powers by an amendment of the Constitution under section 128. It also highlights the inconveniences associated with revocation. There would be no guarantee of continuity or permanence which might lead to a great deal of confusion. Revocation is unpredictable and many people may act on the faith of a reference—vested interests and rights will arise and it would work great hardship to destroy them.

The argument has lost a lot of its force since the decision in the *A.N.A.* case[42] which allowed a reference for a limited time, thus taking away the other major point of Ham K.C.—that a reference could not be of a temporary nature. It should also be noted that by a reference under section 51 (37), an 'amendment' of the Constitution, in the strict sense of the word, is not affected, so it may be inappropriate to say that the effect of the reference can only be altered under section 128.

Those who maintain that a State is able to revoke its reference stress that Parliament must not be able to bind its successors by passing an Act incapable of repeal. This concept found support in the *A.N.A* case. In the words of the High Court, '[t]he will of a Parliament is expressed in a statute or Act of Parliament and it is the general conception of English law that what Parliament may enact it may repeal'.[43]

However, one must bear in mind Lord Denning M.R.'s warning in *Blackburn v. Attorney-General*:[44]

> [w]e have all been brought up to believe that, in legal theory, one Parliament cannot bind another and that no Act is irreversible. But legal theory does not always match alongside political reality. Take the Statute of Westminster 1931, which takes away the power of Parliament to legislate for the Dominions. Can any one imagine that Parliament could or would reverse that Statute?

[41] 'Senex', *op. cit.* 325, Victoria, *Parliamentary Debates,* Legislative Assembly, 10 February 1943, 2845.
[42] (1964) 113 C.L.R. 207.
[43] *Ibid.* 226.
[44] [1971] 1 W.L.R. 1037, 1040.

Reliance cannot be placed solely on the legal doctrine allowing Parliament to repeal previous legislation, so further foundation is necessary. It is found by arguing that a reference is not an exclusive, ultimate power given to the Commonwealth Parliament and that the Commonwealth depends on the State Act referring the matter for power to legislate over the matter.

Judicial comment on the problem has been minimal. In 1942, Latham C.J. said—

> [a] State Parliament could not bind itself or its successors not to legislate upon a particular subject matter, not even, I should think, by referring a matter to the Commonwealth Parliament under sec. 51 (xxxvii) of the Constitution.[45]

The matter still remains in some doubt, although the weight of opinion in cases since tends to confirm that revocation of a reference is possible. In *Graham v. Paterson* Latham C.J. did not meet the problem head on but once again stated that the consequence of irrevocability would 'involve the proposition that a State Parliament can pass an unrepealable Statute' and 'one State Parliament could bind all subsequent Parliaments of that State by referring powers to the Commonwealth Parliament';[46] he felt that the question of revocation was not necessary to the decision in the case. Of the other judges, only Webb J. tackled the question, and in what is the clearest judicial expression on it said:

> I do not think that it is intended to give a State Parliament power to refer matters irrevocably to the Commonwealth Parliament to be exercised by that Parliament exclusively. The consequence of that would be that a State Parliament could completely deprive itself of any authority for all time, although the Commonwealth Parliament might decline to legislate with respect to all or any of the matters referred.[47]

In the *Airlines* case Taylor J. hinted that a State might revoke a reference[48] but Windeyer J. entertained a serious doubt whether a reference could be terminated by the State legislature.[49] The Court in the *A.N.A.* case upheld a decision of the Public Vehicles Licensing Appeal Tribunal. The Tribunal had been of the opinion that a matter may be referred by a State under section 51 (37) otherwise than irrevocably,[50] but the Court avoided the question of whether a State could repeal a reference, except for the suggestion mentioned above.[51]

There seems no legal reason why a State could not pass legislation revoking a reference it had made, and what judicial opinion there is suggests that revocation is possible. It is interesting to note that the

[45] *South Australia v. The Commonwealth* (1942) 65 C.L.R. 373, 416.
[46] (1950) 81 C.L.R. 1, 18.
[47] *Ibid.* 25.
[48] (1964) 113 C.L.R. 1, 38.
[49] *Ibid.* 53.
[50] (1964) 113 C.L.R. 207, 222.
[51] See n. 43.

recently appointed High Court judge, then Mr A. Mason, Q.C., expressed an opinion in 1966, when Commonwealth Solicitor-General, to the effect that the State has a power of revocation. In his view, the court in the *A.N.A.* case 'gave a very clear indication that it would be disposed to answer that question in the affirmative'.[52]

Some support for maintaining that a State can revoke reference legislation may be gained from the wording of section 51 (37), the change from 'was' to 'is', mentioned above, being the relevant word. A Commonwealth law extends only to those States 'by whose Parliaments the matter *is* referred'. This phrasing indicates a continuity of reference; the reference must still be on foot for the Commonwealth law to have application.

If instead of 'is', 'was' were included, it would indicate a once-for-all reference reading along the lines of once the matter has been referred by the States, Commonwealth law applies in those States which have referred. However, the wording suggests that section 51 (37) is to be read so as to mean so long as a matter is referred the Commonwealth law applies to those States in which reference legislation exists.

If a State can revoke, the problem which then arises is the effect of the revocation on the Commonwealth Parliament: does it simply prevent the Commonwealth from passing further legislation, or does it render Commonwealth legislation, passed under the reference, invalid? There is also the further consideration of the effect of revocation of a reference on the law of another State which has adopted, within the terms of section 51 (37), Commonwealth legislation passed in reliance on the original reference. Professor Sawer, arguing against revocation, claims that it would work an inconvenience for the adopting State if a referring State could revoke its reference.[53] However, were the Commonwealth legislation rendered invalid, thus making the State adoption ineffective, the State could gain the benefit of a similar Commonwealth law simply by referring the matter to the Commonwealth.

Clearly legislation passed in reliance on a reference by a State takes effect as Commonwealth law, but it still derives its authority from that State reference. The extent of Commonwealth power is defined by the terms of the reference—whether it be a specific or general matter, whether it be for a fixed period and so on. If a State is able to revoke a reference, the effect on a Commonwealth law would be its invalidation.

If the State statute limits the reference by a time limit, then upon the expiration of the time limit or upon the fixing of the time the reference

[52] South Australia, *Parliamentary Debates,* House of Assembly, 14 March 1967, 3661.

[53] Sawer, 'Some Legal Assumptions of Constitutional Change' (1957) 4 *University of Western Australia Annual Law Review* 1, 9.

comes to an end. If the reference were revoked the Commonwealth Act would cease to operate; so would a State Act adopting the Commonwealth legislation, simply because there would be nothing left to adopt.

Mason Q.C. best explained the effect of revocation on a Commonwealth Act, and gave two reasons for his conclusion, that the Commonwealth law would cease to operate. Firstly, the subject matter with respect to which legislative power was conferred would have been removed by the revocation, and secondly, the contrary view involves the extraordinary result that the Commonwealth law would become immutable and incapable of repeal by virtue of the revocation withdrawing the subject matter from Commonwealth legislative power.[54]

A situation parallelled by that which occurs when a time limit included in a reference expires would arise—the Commonwealth legislation would be spent. The Federal Act would not be repealed; it would simply lose its basis. In this regard section 51 (37) may be compared to the defence power in section 51 (6). Under both subsections the power of the Commonwealth Parliament can be regarded as dependent on a certain set of facts—in the former case, a State Act referring a matter to the Commonwealth, in the latter, facts pertaining to the defence of the nation.

In *Hume v. Higgins,*[55] Dixon J. regarded the principles of statutory interpretation as enabling the court:

> to imply in a statutory provision obviously addressed to a particular state of facts a restriction upon its operation confining it to those facts. When the conditions to which it was directed have passed the statutory provision will then be spent.

The content of the defence power varies greatly: during wartime it comprises a greater number of subject matters than during peace.[56] Similarly, power under section 51 (37) varies according to whether there is a reference on foot and if so, the nature of the reference. There are a number of difficulties in drawing an analogy with section 51 (6) and whether one is available depends on whether one regards section 51 (37) as 'addressed to a particular state of facts'.

If that is held to be so, further difficulties present themselves. The set of facts in regard to section 51 (37) is dependent on the State legislatures, and can be changed by enactment, whereas under section 51 (6) external factors, beyond the control of any legislature, hold the key. The Commonwealth is undoubtedly dependent on the States to refer matters before it can legislate, so this may not be a barrier to the comparison.

A bigger hurdle to get over is that when a State referring Act is revoked the Commonwealth legislation would be spent immediately. However, under

[54] See n. 45.
[55] (1949) 78 C.L.R. 116, 134.
[56] *Koon Wing Lau v. Calwell* (1949) 80 C.L.R. 533, 593 *per* Webb J.

section 51 (6) wartime legislation need not fall to the ground as soon as the war ceases. There is an unwinding period. The extent of the power is reduced, but some power is still in evidence particularly in the immediate postwar period. Perhaps this difference between the two sub-sections could be overcome by regarding a state of facts still in existence after the war, albeit changed circumstances. The main problem lies in the fact that power under section 51 (37), in terms of this discussion, depends on one factual situation, whereas that under section 51 (6) can be exercised in a number of varying factual situations. Despite the differences, an analogy between the sub-sections is tenable.

Similarly, section 52 (1) of the Constitution and its holding back of State law do not begin to operate until a certain situation exists, namely, until a section 52 (1) place has been acquired by the Commonwealth for public purposes.[57] Although here it is the operation of a State law which ceases to have effect when the circumstances change (once the Commonwealth acquires a place for public purposes), it can still be compared to the operation of a Commonwealth law under section 51 (37).

When the Commonwealth so acquires a place, 'the States . . . lose all legislative power, not merely the power to make a new law but the legislative power which could support the continued operation of an existing law in the place acquired'.[58] When the State revokes a reference the Commonwealth loses its legislative power over the matter referred.

Hence the consequences of a State revoking a reference, while said to be impossible or to cause inconvenience, have their parallels elsewhere in Australian Constitutional law. Whether or not a State can actually repeal a Statute in which it has referred matters does remain in some doubt. But the indications are that if the question did arise in the High Court it would allow a State to revoke. Until such a case arises some doubt will remain.

The possibility that a reference might be for all time need not deter the States from passing reference legislation because they can, clearly, safeguard their powers by including a limit of time in the reference, a safeguard which has been upheld in the High Court. It is also possible for the States to pass conditional legislation, and there is no reason why a State could not include an express condition that the reference was subject to revocation by an Act of State Parliament. Such a condition would be a warning not only to the Commonwealth, but also to parties who might rely on the reference, and quashes arguments for irrevocation which stress the inconvenience of revocation or the fact that vested interests will be uprooted.

[57] *Worthing v. Rowell and Muston Pty Ltd and Others* (1970) 44 A.L.J.R. 230, 246 *per* Windeyer J.
[58] *The Queen v. Phillips* (1970) 44 A.L.J.R. 497, 499 *per* Barwick C.J.

The legal doubts discussed in this section may not prove as great as has been thought in the past, and consequently, it might be hoped, although the other factors mentioned in Section 1 still pertain, that valuable use could be made of section 51 (37) in the future to aid co-operation between the Australian governments.

IV POTENTIAL USE OF SECTION 51 (37)

AMENDING THE CONSTITUTION UNDER SECTION 51 (37)

Section 51 (37) has been referred to as an easy or convenient method by which the Constitution can be altered, without having to go through the rigours of a referendum.[59] An alternative to the method for alteration of the Constitution in section 128 might not be a bad thing. The failures of the referendum in Australia are well known and have been adequately dealt with elsewhere.[60]

Clearly, in 1915 and 1942, attempts were made to use section 51 (37) instead of having to hold a referendum either because the Commonwealth was not confident that the people would vote 'Yes', it was inopportune to hold a referendum, or practically it would be easier if the States referred matters to the Commonwealth.

However, strictly speaking, section 51 (37) does not involve an alteration of the Constitution in the same sense that section 128 does. In the former case, the wording of the Constitution remains unaltered. It is not at all clear whether section 51 (37) was intended to be used as a means of amendment. There is no real guidance in section 128, but the point can be made that if it was so intended, why was some indication not given in section 128.

The confusion arises from the effects of both sections. The majority of referenda have attempted to enlarge Commonwealth powers—the same result as achieved by reference. And it is submitted that the better view is to regard section 51 (37) not as a means of amending the Constitution, but rather as providing an effective means, short of formal amendment of the Constitution, whereby additional matters could be brought within the legislative power of the Commonwealth.

The following section deals with areas in which it might be thought suitable for the Commonwealth to have additional power, and hence for the States to refer matters to the Commonwealth.

[59] Joske, *Australian Federal Government* (2nd ed. 1971) 57; Durack and Wilson, 'Do We Need a New Constitution for the Commonwealth?' (1967) 41 *Australian Law Journal* 231; *Official Record of the Debates of the Australasian Federal Convention* (1898) 217 (Deakin); 218 (Quick).

[60] Crisp, *Australian National Government* (1965) 44 ff.

OPPORTUNITIES FOR USE

The following discussion, in urging that reference can be made, almost should be made, in a number of areas, perhaps presupposes that the States forget their previous doubts and fears regarding the reference power, feelings which, as history has shown, cannot be ignored. In this sense the whole discussion may be regarded as hypothetical; but it seems necessary to stress the potential power inherent in section 51 (37), a means whereby co-operation between Commonwealth and State governments can be initiated by the States.

In 1959, the Joint Committee on Constitutional Review recommended that the Commonwealth's concurrent powers be clarified or enlarged with respect to the following matters: navigation and shipping, aviation, scientific and industrial research, nuclear energy, broadcasting, television and other telecommunication services, industrial relations, corporations, restrictive trade practices, marketing of primary products, economic powers.[61] It may be that in these general areas, we have the guidelines for future use of section 51 (37) by the States.

A major drawback in relying on the reference power to enable uniform Commonwealth action in an area where Commonwealth legislative power is deficient is the need for all States to pass similar legislation and the difficulty of persuading the States to do so. The reluctance with which the States approach the use of section 51 (37) has been stressed throughout this article and the lack of reference bears witness to this reluctance. However, there is an abundance of precedents of joint Commonwealth-State action, both legislative and executive.

Joint action has taken the form of complementary legislation, for example, the uniform company legislation passed in 1961, and the Federal Wheat Industry Stabilization Act 1958 and complementary State Acts,[62] and it might well be asked why the States did not refer such matters, and many others,[63] to the Commonwealth. The answer can only be found in the reasons suggested in Section I. These reasons become harder to justify when the demerits of complementary legislation are detailed, demerits which would be removed by a reference from the States to the Commonwealth.

Both complementary legislation and reference legislation have a similar effect, that of enabling a Commonwealth Act to operate in a particular State. Without the legislation the Commonwealth Act would be defined constitutionally, and would have no application in the State. That the two

[61] *Report of Joint Committee on Constitutional Review* (1959) 57-149.

[62] *E.g.*, Wheat Industry Stabilization Act, 1958 (N.S.W.); Wheat Industry Stabilization Act, 1958 (Vic.).

[63] For instance, in 1934-5 it was contemplated that the States should refer 'aviation' to the Commonwealth, an occurrence which never occurred. *R. v. Burgess; Ex parte Henry* (1936) 55 C.L.R. 608, 626.

are similar is seen from the Trade Practices Act 1965-1967 which left two courses open to the States to enable the Commonwealth Act to apply in a particular State.

It does seem that a reference under section 51 (37) has distinct advantages over complementary legislation, not the least of them being that instead of two laws operative in a particular area, there is one, the Commonwealth law. Administratively, it would seem more convenient to have only one law duplication and overlapping would be avoided. State complementary Acts could not depart in any material way from the Commonwealth Act so as to create a hiatus in which certain facets of the particular area might be outside the Commonwealth law. Allied with this need for the two Acts to be similar is the need for the State complementary legislation to keep in line with all amendments to the Commonwealth Act so as to avoid divergence.

One Commonwealth Act applicable as a result of reference would also reduce uncertainties in power and construction to a minimum, and would avoid the doubt raised by Mason Q.C. in relation to the vesting of State jurisdiction in a Commonwealth tribunal.[64] There should be no bar in principle to a Commonwealth tribunal exercising both Federal and State jurisdiction. However, no case on the point has been decided, and the doubt is raised by a negative inference from Chapter III of the Constitution, which is an exhaustive statement of judicial power and nowhere mentions the exercise of State jurisdiction in federal tribunals.

Having raised these advantages, it must appear that in certain situations, reference legislation is desirable. The two areas in which the need is most evident are that of aviation and the broad class of other matters arising under section 51 (1) which can only apply to interstate trade and commerce.

In the *Airlines* case,[65] it was asserted that the Commonwealth's power to make laws dealing with aerial navigation is so wide that the operation of State laws in any way touching aircraft or their operational use for any purpose solely within the State may be excluded.[66] Taylor J. quickly rejected this assertion by pointing out that it was in direct conflict with the decision in *R. v. Burgess; Ex parte Henry*[67] and *R. v. Poole; Ex parte Henry (No. 2)*,[68] both of which limited Commonwealth power over aviation.

The problem arises because nowhere in the Constitution is the Commonwealth specifically given power over 'aviation'. It has some power to deal with certain matters relating to aviation under the trade and commerce power, external affairs power[69] and postal, telegraphic, telephonic power.[70]

[64] See text at n. 74.
[65] (1964) 113 C.L.R. 1.
[66] *Ibid.* 39.
[67] (1936) 55 C.L.R. 608.
[68] (1939) 61 C.L.R. 634.
[69] S. 51 (29).
[70] S. 51 (5).

But the power is very limited in intra-state matters, witnessed by the lack of Trans-Australia Airlines services in a number of States. If these States wish to take full advantage of the Commonwealth's two-airline policy, a reference of the matter of 'aviation', it is submitted, would be the best course to follow.

Richardson, in an article published in 1963,[71] supposedly covered the constitutional aspects affecting the Commonwealth trade practices scheme, but omitted any reference to section 51 (37), a valuable tool in implementing such a scheme. Unfortunately, only Tasmania has acted under the section, giving the Commonwealth Act operation in that State. It would be desirable for the Act to have uniform operation throughout Australia and thereby control such practices as occurred in *Bourke Appliances Pty Ltd v. Wonder.*[72]

In that case a group of Victorian retailers determined to boycott any manufacturer who supplied discount houses. The plaintiff, one of the discount houses black-listed by manufacturers, sought to establish that the group of retailers were conducting a practice contrary to section 4 (1) of the Australian Industries Preservation Act 1906-1950.[73] But it was held that the section did not catch the practice engaged in, in relation to intra-State trade between a manufacurer's in-State bulk store and in-State retailers, even though goods moved from the manufacturer's out-of-State factory to his in-State store.

Although the Trade Practices Act 1965-1967 was not concerned, it is still relevant to notice the limits on Commonwealth power. This may be one area where it would not be necessary for all the States to refer the necessary matters—the Tasmanian Act, now nearly seven years old, has not met with any challenge.

Other areas in which a reference could be made by the States, as a matter of practicality would require uniform reference legislation. Regulation of the securities market has been suggested as one such area.[74] Another area where it would be absolutely essential for *all* States to pass referring Acts would be in that of individual liberties. There are few Constitutional guarantees in Australia, and at some future stage it might be thought desirable to enact a Bill of Rights. Entrenchment of a Bill of Rights would need to be achieved under section 128 of the Constitution, but an unentrenched Bill could be brought about by legislative action on the part of

[71] Richardson, 'The Law Relating to the Australian Trade Practices Plan' (1963) 37 *Australian Law Journal* 203.

[72] [1965] V.R. 511 (decided in November 1961 by Smith J.).

[73] S. 7 (1) (a) Trade Practices Act 1965-1967 is similar to s. 4 (1), although in wider terms.

[74] Howard, 'The Constitutional Power of the Commonwealth to Regulate the Securities Market' (1971) 45 *Australian Law Journal* 388, 396.

the States under section 51 (37)—but only if all the States passed such legislation.

There is a lot of scope for the use of section 51 (37) to enable the Commonwealth to exercise its powers unfettered by constitutional limitations. A number of further areas have been suggested.

Price control might be possible if the States referred the matter. Such a referral was agreed upon at the 1942 Conference of Commonwealth and State Ministers, but only New South Wales and Queensland included the referral in their Commonwealth Powers Acts. In 1948, a proposed amendment to the Constitution to add a further specific power to the Commonwealth to legislate regarding prices was rejected by the electorate.[75] For any such legislation to avoid the effect of section 99, it is likely that all States would need to refer the matter.

The Commonwealth may desire to set up a collective pool marketing scheme to aid the administration and disposal of agricultural products. It seems established that a marketing scheme would have to accord with the 'just terms' requirement in section 51 (31), but it is 'arguable that if the States were to refer a peacetime marketing power to the Commonwealth under section 51 (37) of the Constitution, they could do so in language excluding or modifying the requirement of just terms'.[76] There may be constitutional objections to such a referral, in that it overrides constitutional limitations, but it may be upheld on the basis that section 51 (37) is designed to enable the States to empower the Commonwealth to do what it otherwise cannot do. The reason there has been no referral of this matter to date is that pooling has been able to be done in co-operation with the States who are constitutionally free to acquire property on any terms they choose.[77]

With the vast stock pile of literature reflecting the inadequacies of the adversary procedure of the courts in dealing with matrimonial matters, it is relevant to consider the establishment of a system of family courts in Australia, which courts would deal solely with such matters. A step in the right direction would be to create a single jurisdiction for the whole of Australia, instead of the present Commonwealth-State division of responsibilities. It has been suggested by Finlay that one way of achieving a single jurisdiction might be under section 51 (37):

> [i]nterpreting the powers of the Commonwealth at their widest, it seems that only a narrow area would remain outside, e.g., that dealing with paternity suits and illegitimacy cases. Since it seems desirable that these cases should be dealt with in the same jurisdiction that deals with other

[75] The referendum failed in all States. See Crisp, *op. cit.* 48.
[76] Narain, 'Some Problems of Commonwealth Collective Marketing Legislation in Australia' (1964) 38 *Australian Law Journal* 8, 19.
[77] *Ibid.* 8.

family matters, this could perhaps be referred by the States to the Commonwealth under s. 51 (xxxvii) of the Australian Constitution.[78]

An interesting case is provided by that of offshore petroleum. The Offshore Petroleum Agreement 1967 was designed and entered into to overcome constitutional and legal doubts relating to the exercise of legislative and executive jurisdiction by the Commonwealth and States over the maritime areas adjacent to the Australian coastline.

None of the original Constitutions of the Australian colonies (apart from the South Australian Letters Patent) defined territorial limits or boundaries so as to include water areas. It has been suggested, however, that the exercise of jurisdictional rights over territorial waters, as well as in certain cases over the sea-bed thereof, by Australian Colonial legislatures in the latter part of the last century is strong evidence to support the view that colonial sovereignty extended to the three mile limit.[79]

Lumb[80] relies on a judgment by Evatt J. in *Federal Commissioner of Taxation v. E .C. Farley Ltd*[81] to support the claim that general legislative power over the sea-bed within territorial waters is vested in State legislatures, and this power would extend to legislation licensing persons to explore and exploit the mineral wealth of the sea-bed. If this analysis is correct, legislation under section 51 (37) could be invoked if felt desirable. However, such a reference does not appear likely in the near future in the light of the jealous stand being taken by the States at present. In any case, because of the constitutional doubts which exist, it may be that the States lack jurisdiction over the sea-bed and consequently, any 'reference' might refer a non-existent matter, and thus be no reference at all.

The above 'matters' are by no means exhaustive, but simply illustrative of the potential and future use of section 51 (37). An obvious problem lies in overcoming past reluctance to use the section, and when it has been used, in persuading all the States to legislate accordingly. A prediction based on past experience is not bright, even though many of the legal doubts surrounding section 51 (37) have been clarified. It does seem that a State might be able to revoke a reference, but until this ramification of the section is authoritatively dealt with in the High Court, the cloud will continue to hang over section 51 (37).

However, there are really no overriding reasons why more use should not be made of section 51 (37) in the future, in the many areas in which uniform legislation throughout the Commonwealth is desirable.

[78] Finlay, 'The Broken Marriage and the Courts' (1970) 6 *University of Queensland Law Journal* 23, 36 n. 72.
[79] O'Connell, 'Australian Coastal Jurisdiction' (1966) *International Law in Australia* 249, 272 ff.
[80] Lumb, *The Law of the Sea and Australian Off-Shore Areas* (1966) 58.
[81] (1940) 63 C.L.R. 278, 322.