RE-EVALUATING THE ROLE OF THE REFERRAL POWER IN AUSTRALIAN FEDERALISM: A TOOL OF LAST RESORT?

NICHOLAS MOSES*

I INTRODUCTION

Section 51(xxxvii) of the *Constitution of Australia ('Constitution')* (the 'referral power') empowers the Commonwealth Parliament to legislate with respect to matters within the remit of the States upon their referral by a State. From 1986, following the family law referral, the manner and frequency of the use of the referral power has greatly expanded the ability of the Commonwealth to enact legislation on matters traditionally governed by the States. This article outlines this trend and contends that Australian Parliaments have relied too heavily on the referral power (sometimes described as the reference power) to implement uniform legislation. This trend has led to a centralisation of power and has diminished the political accountability of State governments. While the use of the placitum is not inherently inconsistent with a federal constitutional system, it is argued that the power should be used sparingly and as a tool of last resort so as not to dilute the power of State legislatures. This article seeks to provide some principles useful to an assessment of the reasoning for, and merits of, the use of this power by various governments over time.

The States' response to the COVID-19 pandemic has highlighted the importance of federalism and the need for bespoke approaches to policy being implemented by individual States based on their local experience. The States' pursuit of the

* BA (Dist.), LLB (Hons), University of New South Wales; Associate to Justice Cheeseman of the Federal Court of Australia. I thank Professor Patrick Keyzer and Professor Rosalind Dixon for their guidance in respect of earlier iterations of this article.

publicly stated goal of 'aggressive suppression'[1] of community transmission of COVID-19 pending the vaccination of the community could only be achieved by the use of proportionate public health orders in each State based on localised risks of transmission and the enforcement of those public health orders by State police forces. Australia's recent response to COVID-19 in suppressing cases and deaths, which was more effective than most other nations, demonstrated the benefits of federalism in platforming localised decision-making. The advent of this once-in-a-century pandemic has been timely in illustrating the importance of the States' role, why a national approach does not always depend on a single response from the Commonwealth, and the value of cooperative federalism when it is implemented in a manner that shows fidelity to the meaning of that phrase.

The transfer of a State's legislative responsibility to the Commonwealth, which avoids political accountability for the creation and management of the legislative scheme based on the referral, can be problematic, and involves sacrificing other constitutional principles. Significantly, a referral may be inconsistent with the principle of subsidiarity; the principle that decision-making should reside at the most local level of decision-making where appropriate in order to reflect the will of those most directly impacted.[2] This article does not contest the constitutionality of referrals. Rather, it is argued that the Commonwealth and the States should be restrained in their use of the referral power due to the effectiveness of State policy-making facilitated by federalism, the principle of subsidiarity, the preservation of the political accountability of States to their constituents, and to prevent undue restrictions on the legislative regimes of subsequent State Parliaments.

Part I of this article will outline the nature, development and scope of the placitum. Part II will make a case for the importance of federalism as a limitation on

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[1] Nick Coatsworth, 'Eliminating COVID-19 a false hope', *Australian Government Department of Health* (16 July 2020) <https://www.health.gov.au/news/eliminating-covid-19-a-false-hope>.
[2] Michelle Evans and Augusto Zimmermann, 'The Global Relevance of Subsidiarity: An Overview' in Michelle Evans and Augusto Zimmermann (ed 1), *Global Perspectives on Subsidiarity* (Springer Netherlands, 2014) 1, 1–3; Oxford University Press, *Max Planck Encyclopedias of International Law* (online at 14 August 2022) Subsidiarity.

government power. Broadly, federalism has two main conceptions – 'traditional' and cooperative federalism. As will be specified below, traditional federalism refers to the *division* of powers in the *Constitution*, enshrined by the framers in order to protect liberty and limit governmental power, influenced heavily by the federal model in the Constitution of the United States of America.

Cooperative federalism has been argued to support the use of the referral power to 'solve national problems'.[3] But while the *phrase* cooperative federalism has been invoked as a value to justify engagement with the use of the referral power,[4] cooperative federalism only really takes place when there has been *genuine and ongoing* cooperation. Understood in this way, cooperative federalism requires a cautious approach to the referral power. To reiterate, referrals are not cooperative if States merely abdicate their responsibilities. The response to the COVID-19 pandemic by the States has highlighted cooperation in practice – the creation of a 'National Cabinet' has fostered cooperative federalism which has allowed the Commonwealth and States to manage COVID-19 so as to largely achieve aggressive-suppression and/or elimination. Of course, neither the Commonwealth or State Constitutions recognise the concept of a National Cabinet which is neither a committee or sub-committee of the Commonwealth Cabinet.[5] The States' heightened ability to respond to developing circumstances has operated in concert with this dynamic form of cooperative federalism. This has largely been due to the States' localised knowledge of their communities – being hospital systems and their capacities, local geographies, community demographics, and the school sector.

Part III explains why referrals should be used as a last resort. It is argued that while individual referrals may be justified for reasons such as consistency and efficiency,

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[3] Robert French, 'Co-operative federalism - a constitutional reality or a political slogan' (Speech delivered at Western Australia 2029; A Shared Journey State Conference, 17-19 November 2004) <http://www.austlii.edu.au/au/journals/FedJSchol/2004/21.html>.
[4] Ibid.
[5] *Patrick and Secretary, Department of Prime Minister and Cabinet* [2021] AATA 2719.

the cumulative effect of referrals has resulted in an over-centralisation of power in the Commonwealth. Such creeping centralisation cannot be justified merely on the basis that States willingly partake in making referrals to the Commonwealth. Whilst States refer matters to the Commonwealth of their own volition, the realpolitik of Australian federalism is Commonwealth fiscal dominance. The Commonwealth and the States do not arrive at the table with equal power. This imbalance may cause States to sacrifice subsidiarity, a principle that enhances popular sovereignty by emphasising the right of the individual in society to have issues which affect them dealt with by the government closest to them.[6] Furthermore, whilst a referral may represent the submission of a particular State Parliament to centralisation, it unduly binds future State Parliaments that will be elected with different compositions. Professor Michael Detmold has referred to this constitutional value as 'inter-temporal equivalence' – the idea that all (State) Parliaments should be as powerful as their predecessors.[7]

The role of the referral power in causing a simultaneous erosion of traditional and cooperative federalism is illustrated by examples evidencing its use in circumstances that, whilst justifiable on grounds of efficiency, have contributed to the cumulative effect on the centralisation of power in the Commonwealth (the enactment of national corporations), and where it was not justifiable as a first-order legislative response (anti-terrorism and, with the exception of Western Australia, industrial relations).

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[6] Michelle Evans and Augusto Zimmermann, 'The Global Relevance of Subsidiarity: An Overview' in Michelle Evans and Augusto Zimmermann (ed 1), *Global Perspectives on Subsidiarity* (Springer Netherlands, 2014) 1, 1–3; Oxford University Press, *Max Planck Encyclopedias of International Law* (online at 14 August 2022) Subsidiarity.

[7] Michael Detmold, *The Australian Commonwealth: a fundamental analysis of its constitution* (Law Book Co, 1985) 207–8.

II THE NATURE AND SCOPE OF THE REFERRAL POWER

A *Basis of Power*

Section 51(xxxvii) of the *Constitution* permits the Commonwealth Parliament to legislate with respect to:

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

It is first important to note that the referral power permits the Commonwealth Parliament to legislate with respect to matters referred to it – that is, matters arising under legislation made pursuant to powers which lie with the States.[8] The power to legislate on those matters is not the subject of the referral.[9] This distinction was drawn in *Graham v Paterson* on the basis that s 51 involves concurrent powers between the Commonwealth and the States, in addition to the role of s 107 of the *Constitution*.[10] The judicial resolution of disputes arising under such a law occurs under federal jurisdiction pursuant to s 76(ii) of the *Constitution.*[11]

B *Usage Over Time*

The referral power has been increasingly deployed since the mid-1980s, which has resulted in national schemes applicable to nearly all States. Whilst there occurred a rapid increase in its use in the 1940s 'in times of war and post-war reconstruction' this was somewhat of a false dawn, given the power fell out of usage for approximately forty years thereafter.[12] Likely reflecting the lack of consideration

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[8] *Graham v Paterson* (1950) 81 CLR 1, 19.
[9] Ibid.
[10] Ibid 22.
[11] Cheryl Saunders, 'A New Direction for Intergovernmental Arrangements' (2001) 12(4) *Public Law Review* 274, 282.
[12] Greg Calcutt, 'A Commentary on the Mechanics of Referring Matters under s 51(xxxvii) of the Constitution' (2011) 6 *Public Policy* 89.

given to it at the Australasian Federal Convention Debates (‘*Convention Debates*’), the referral power was used infrequently until the latter part of the 20th century.

It is asserted that the main reason for its previous lack of usage was because the States did not wish to easily cede areas of their own power to the Commonwealth.[13] This rationale of the States is arguably accentuated by the already wide scope of Commonwealth legislative power.[14] The basis for such an assertion is largely due to decisions of the High Court with respect to s 51, such as in the *Engineers Case*[15], and the *Tasmanian Dam Case*.[16] Furthermore, the advent of intergovernmental agreements to facilitate cooperation between the Commonwealth and States, uniform legislation across the States related to such agreements, and the establishment of bodies, such as tribunals, with power sourced from the States and Commonwealth, have been utilised by the States as methods of circumventing the referral power.[17] Importantly, part of the States' reluctance can be attributed to the uncertain scope and operation of the referral power,[18] detailed in sub-section c) below.

The first recorded referral of power by a State Parliament was in New South Wales, with the passage of the *Commonwealth Powers (War) Act 1915* (NSW) which conferred on the Commonwealth a range of matters necessary for the war effort for its duration, and a period of twelve months after its conclusion.[19] This legislation highlights the shift that has occurred in the culture of referral. The preamble notes that the Premiers of the States at a conference in 1915 had agreed

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[13] Marco Bini, 'Mutual Recognition and the Reference Power' (1998) 72(9) *Australian Law Journal* 696, 707 citing Graeme Johnson, 'The Reference Power in the Australian Constitution' (1973) 9(1) *Melbourne University Law Review* 42, 46.
[14] Bini (n 13) 706.
[15] (1920) 28 CLR 129, 155.
[16] (1983) 158 CLR 1.
[17] Bini (n 13) 707–708.
[18] Bini (n 13) 708; Saunders (n 11) 282; P Buchanan, ‘The Queen v. Public Vehicles Licensing Appeal Tribunal of Tasmania; Ex parte Australian National Airways Ltd — Case Note’ (1964-65) 1 *Federal Law Review* 324, 327.
[19] *Commonwealth Powers (War) Act 1915* (NSW) ss 3, 5.

to pass identical legislation referring such matters to the Commonwealth. However, it was only the New South Wales Parliament which actually acted upon the agreement at this conference. This sheds light on the state of cooperative federalism immediately after federation – a formal agreement between State Premiers did not carry enough importance to result in State Parliaments enacting legislation in accordance with it. In contrast, the advent of the Council of Australian Governments in 1992 led to the formalisation and heightened importance of dialogue between the States and Commonwealth, with it playing a key role in subsequent referrals.[20]

Until the family law referrals from 1986 to 1990, each State Parliament had on average enacted referral legislation (with the exception of Western Australia that did not participate in the family law referral), approximately just three times in the 85 years preceding the introduction of the family law scheme.[21] In contrast, from 1986 to the present each State Parliament has on average enacted approximately fourteen pieces of referral legislation.[22]

C *Rate Of Use Of The Referral Power*[23]

State	**Referrals before 1986**[24]	**Referrals from 1986**[25]

[20] See, for example: Council of Australian Governments, *National Credit Law Agreement 2009* <https://federation.gov.au/about/agreements/national-credit-law-agreement>.
[21] 'Notes', *Parliament of Australia* (Web Page, 31 May 2013) <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution/Notes>.
[22] Ibid.
[23] This table has been prepared by this author and quantifies the referral legislation enacted by each State Parliament before and after 1986 (but does not include legislation dealing with amendments to referrals).
[24] For a complete list of matters referred prior to 2013, see 'Notes', *Parliament of Australia* (Web Page, 31 May 2013) <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution/Notes>.
[25] Ibid.

New South Wales	4	16
Victoria	4	14
Queensland	4	13
South Australia	3	14
Western Australia	2	12
Tasmania	3	12

The referral power's obvious rationale is to allow the nation to meet the changing circumstances of the future by giving the Commonwealth flexibility in its legislative powers without recourse to a referendum.[26] The requirement for a referendum under s 128 means that the approval of voters must be sought, which has historically been a difficult task. In relation to expanding government power, the task is even harder. The staggeringly low rate of successful referenda since federation of 8 from 44 proposals makes it simple to understand why the Commonwealth would rely upon referrals instead to deal with situations as they arise. In dealing with the increasing State reliance upon the Commonwealth in areas of public policy and expenditure, as far back as 1951 it was remarked that the referendum mechanism 'has proved to be an unsatisfactory instrument of constitutional amendment'.[27] Instead, Ross Anderson noted that the referral power 'provides another method of enlarging federal powers'.[28] Former Western Australia Attorney-General Jim McGinty has suggested that, in light of the

[26] Bini (n 13) 707
[27] Ross Anderson, 'Reference of Powers by the States to the Commonwealth' (1951) 2(1) *University of Western Australia Law Review* 1.
[28] Ibid.

'unlikely prospect of constitutional amendment' and in order to ensure that the *Constitution* 'is to work', the referral power ought be used as an alternative method of 'enabling the Commonwealth to work in areas of State responsibility'.[29]

It appears another main purpose of the placitum at the time of the *Constitution's* inception was to allow the Commonwealth to enact targeted legislation at a multiplicity of, but not all, States in dealing with an issue of common concern, such as the use of the Murray-Darling.[30] It has also been argued that the power could deal with limits on the ability of States to legislate extraterritorially by permitting common legislation for two or more States.[31] State legislation was limited by imperial legislation which limited the extraterritorial operation of its laws, which the Commonwealth was not subject to following the *Statute of Westminster Adoption Act 1942* (Cth).[32]

In 1990, the prominent federalism commentator Professor Greg Craven expressed the opinion that the use of the referral power would decline.[33] This was an understandable position given the rare usage of the power up to that point. But the key difference between the use of the referral power before and after the family law referral was its use in quick succession between individual referrals, and to establish national schemes. Professor Craven had pointed to uncertainties regarding the ability of States to terminate a referral to the Commonwealth as the main reason why the power had been under-used.[34] As history revealed, and as will be detailed below, the High Court's interpretation of the cross-vesting scheme in relation to the conferral of jurisdiction under the corporations law cooperative scheme between the States and Commonwealth essentially precipitated a shift in

[29] Jim McGinty, 'Referral of Powers' (2011) 6 *Public Policy* 81.
[30] John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books,1976) 649–650 cited in Bini (n 13) 706–707.
[31] Bini (n 13) 707 citing Graeme Johnson, 'The Reference Power in the Australian Constitution' (1973) 9(1) *Melbourne University Law Review* 42.
[32] Anderson (n 27) 5–6.
[33] Greg Craven, 'Death of a Placitum: The Fall and Fall of the Reference Power' (1990) 1 *Public Law Review* 285.
[34] Ibid 287.

the attitudes of governments towards the referral power. This produced a shift in the dynamic between the States and the Commonwealth to permit Commonwealth law-making over matters within their constitutional remit. The States have also developed mechanisms to circumvent the uncertainties regarding termination of their referrals.

D *Scope of the Referral Power*

As a consequence of its low usage prior to 1986, the referral power has not been subject to the same level of judicial consideration as other heads of power under s 51 of the *Constitution*. As such, there is a degree of uncertainty about the scope of the power.

1 *Settled Aspects*

The High Court has held that the referral power requires State Parliaments to pass legislation which refers the relevant matter to the Commonwealth Parliament.[35] A referral cannot be made in any other manner. The referring legislation can be either broad or text-specific. Namely, it can take the form of a bill which specifies the exact provisions of the law to be enacted by the Commonwealth, or it can be one which refers the subject matter in a more general manner.[36] The referral of a broad subject matter is supported by the principles of constitutional interpretation decided in the *Engineers Case* and it has been argued that the 'historical genesis' of the power supports such an interpretation.[37] Such a genesis springs from s 15(i) of the *Federal Council of Australasia Act 1885*, whereby two or more of the Colonies could essentially refer matters to the Federal Council framed in general

[35] *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 226 (‘*Public Vehicles Licensing’*).
[36] Ibid 225.
[37] Anderson (n 27) 4.

terms.[38] It was observed by Jim McGinty in 2011 that the 'growing view' was in favour of textual references, which maximise the retainment of State powers.[39]

Following a referral, a State Parliament continues to have the power to legislate on the subject matter which it has referred to the Commonwealth. This is on the basis that a State Parliament cannot refer its power to legislate, but rather refers particular legislative matters.[40] The High Court has held that it leads to a 'creation of an additional power in the Commonwealth Parliament' which does not subtract from the referring State(s) because s 51 relates to concurrent, not exclusive powers.[41] However, legislation enacted by a State on the same subject matter as the legislation referred will be rendered invalid on the basis of s 109 where there is inconsistency.[42]

Further, the High Court has held it to be permissible for referral legislation to have termination provisions which can provide for the expiration of the referral after a stipulated period of time, as well as to make its termination contingent upon a future event occurring, such as the State Governor making a proclamation.[43] It is theoretically sound for the Commonwealth's power over a matter referred to it to be extinguished by a termination. It has been accepted in other constitutional situations that the temporal effect of a changing situation external to the relevant Commonwealth legislation can shrink and remove the source of power for the legislation, such as the waxing and waning of the defence power.[44] Termination options are now utilised by States as a method of ensuring that referrals are not subject to the uncertainties outlined below, on which the High Court has not provided a definite view. In contrast, the validity of termination clauses has been

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[38] Ibid.
[39] McGinty (n 29) 87.
[40] Anne Twomey, *Constitution of New South Wales* (The Federation Press, 1st Ed, 2004) 811.
[41] *Graham v Paterson* (1950) 81 CLR 1, 19 (Latham CJ).
[42] Ibid 19–20 (Latham CJ).
[43] *Airlines of NSW v New South Wales* (1964) 113 CLR 1, 52–53 (Windeyer J); *Public Vehicles Licensing* (n 35) 226.
[44] Anderson (n 27) 8.

endorsed as valid by the Court, thereby allowing States to retain ultimate control over a referral.

2 *Uncertainties*

Whilst referral legislation can contain termination provisions, two key uncertainties surround the duration of a referral where provisions allowing for termination are not contained within the referring legislation. The referral power has been described as 'fascinating and hazardous', owing to its 'virtually non-existent' judicial consideration.[45] It appears that the balance of High Court authority is in favour of the view that a referral likely cannot be made to the Commonwealth for an indefinite period of time.[46] However, the result of the lack of case law and certainty on this point has been borne out in practice, as States continue to enact referrals which contain termination provisions.

First, the High Court has not determined whether a State Parliament can repeal referral legislation. There are indications both judicially and extra-judicially that States are prevented from doing so. In *Airlines of NSW Pty Ltd v New South Wales*[47], Windeyer J noted that referral legislation cannot be repealed by a State Parliament.[48] This is because the subject matter becomes added to the powers of the Commonwealth under the *Constitution*, and accordingly the Commonwealth 'is not exercising a legislative power of the State conferred by a State Parliament and revocable by that Parliament'.[49] Further, former Chief Justice Isaacs argued during the *Convention Debates* that matters are irrevocable by State Parliaments after being referred.[50] Former Chief Justice Robert French weighed into this question whilst sitting on the Federal Court, noting that revocability was an 'open

[45] James A Thomson, 'Adopting Commonwealth Laws: Section 51(xxxvii) of the Australian Constitution' (1993) 4(3) *Public Law Review* 153, 155.
[46] Bini (n 13) 709.
[47] (1964) 113 CLR 1.
[48] Ibid 53.
[49] Ibid 53.
[50] *Convention Debates* 223.

question'.[51] Professor Cheryl Saunders has stated that there is 'some chance' that States are unable to revoke references that are 'unlimited'.[52] Saunders has noted that a question lingers as to the impact on a Commonwealth law's validity by lapsed or revoked referral legislation.[53] On the other hand, former Chief Justice John Latham asserted in *South Australia v Commonwealth*[54] that, due to the principle that a Parliament cannot bind its successors (the principle of inter-temporal equivalence), State Parliaments have the power to repeal referral legislation (although this does not necessarily mean that successors can easily repeal a referral if they so wish – the practical and political difficulties involved in doing so are discussed below in the context of inter-temporal equivalence).[55] In addition, views of legal academics tend to favour the ability to repeal. Professor Andrew Lynch contends that State Parliaments must have the power to repeal referral legislation, rejecting the argument that repeal legislation would be invalid due to inconsistency with the in-force Commonwealth legislation empowered by the referral under s 109.[56] Professor Anne Twomey has argued that it is 'likely' that repeals are possible.[57]

Second, even if State Parliaments can repeal referral legislation, there remains the distinct possibility that Commonwealth legislation enacted pursuant to a referral continues to operate after the repeal of the referral legislation. In *Public Vehicles Licensing*, the High Court had the opportunity to express an opinion on repeal, and potentially with respect to the consequences of a repeal, but declined to do so.

Support for the view that Commonwealth legislation does not terminate upon repeal of the referral legislation can again be found in the view of Isaacs at the

[51] *Board of Examiners under the Mines Safety and Inspection Act 1994 (WA) v Lawrence* (2000) 100 FCR 255, 264 [17] cited by Saunders (n 11) 282.
[52] Saunders (n 11) 282.
[53] Saunders (n 11) 282.
[54] (1942) 65 CLR 373.
[55] Ibid 416.
[56] See Andrew Lynch, 'After a Referral: The Amendment and Termination of Commonwealth Laws relying on s 51(xxxvii)' (2010) 32(3) *Sydney Law Review* 363, 382 ('*After a Referral*').
[57] Twomey (n 40) 810, quoted in Lynch, *After a Referral* (n 56) 382.

Convention Debates, who argued that 'nothing less than the federal authority can get rid of' the Commonwealth legislation predicated on a referral because it is a federal law.[58] Former Chief Justice French has also expressed support for this view.[59] For if a repeal were to necessitate the invalidity of Commonwealth legislation, on one view this would have the effect of fettering the statutory independence of the Commonwealth Parliament. It is important to observe here that even Robert French, a staunch proponent of cooperative federalism, makes the argument that Commonwealth legislation continues after a repeal of referral legislation. Again, however, there is the very sound view that what is relevant is not whether a State can repeal Commonwealth legislation, but that the temporal circumstances external to the Commonwealth legislation on which it relies have been altered. As observed by Anderson, '[t]he revocation of the reference does not repeal the Act any more than the cessation of hostilities and the return to peace-time conditions repeals war-time defence legislation'.[60] Anderson has also discounted the possibility of s 109 invalidating repeal legislation on the rationale that s 109 extends, rather than limits, federal powers under s 51 – which are 'subject to' other provisions of the *Constitution* that limit them.[61] To ensure the efficacy of any repeal, Anderson suggested that referral legislation should include a provision that the matter for referral would be subject to a future repeal, which 'would simply mark out the matter referred in the same way as a reference for a definite period'.[62] As Professor Saunders has observed, these questions have 'for the most part' been resolved, from which the States can take comfort in making referrals.[63] However, it can still be said that the authorities and extra-judicial commentary on the revocability and termination of referrals is not settled, and will not be until the High Court is required to deal with this point. In the meantime, we can assume

[58] *Convention Debates* (n 50) 223.
[59] Robert S French, 'The Referral of State Powers' (2003) 31 *University of Western Australia Law Review* 19, 33.
[60] Anderson (n 27) 8.
[61] Anderson (n 27) 9.
[62] Ibid.
[63] Saunders (n 11) 282

that States will continue to include provisions which terminate the referral legislation after a certain period unless it is extended, predominantly through gubernatorial proclamation.[64]

III THE IMPORTANCE OF FEDERALISM

Federalism has been relied upon by the High Court to draw implications from both the text and structure of the *Constitution*. Federalism is described in express provisions of the *Constitution*, under ss 107–109,[65] and is also an implication derived from the federal structure of the *Constitution*. The *Melbourne Corporation* principle is an example of a principle implied from the *Constitution*, which requires that Commonwealth powers not be exercised in a manner which destroys or curtails the 'continued existence of the States or their capacity to function'.[66]

A *The 'Traditional' Role of Federalism*

The federal structure of the *Constitution* serves the broad purpose of upholding liberty[67] by dividing government power between the two spheres of government.[68] James Madison's conception of federalism provides that a federal government does not have 'indefinite supremacy over all persons and things, so far as they are objects of lawful government'.[69] Accordingly, the very nature and purpose of a federal division of powers, as enshrined in the *Constitution*, is to prevent the accumulation of powers in a national government. This characterisation of federalism as a protector of individual liberty and limitation of government power is labelled 'traditional federalism' for the purposes of this article because it was the major theoretical influence on the formulation of federalism in the *Constitution*. The American model of federalism heavily influenced the first draft of the

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[64] See, for example: *Corporations (Commonwealth Powers) Act 2001* (NSW), ss 5–7.
[65] *R v Phillips* (1970) 125 CLR 93, 118 (Windeyer J).
[66] See: *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 231.
[67] *New South Wales v Commonwealth* (2006) 229 CLR 1, 229 [558] (Kirby J).
[68] *United States v Lopez* 514 US 549, 552 (1995).
[69] Alexander Hamilton, James Madison and John Jay, *The Federalist: On the New Constitution, Written in 1788* (Masters, Smith & Company, 1857) 153.

Constitution by Andrew Inglis Clark. As it is known, the general structure of that draft eventuated into the final version of the *Constitution*.[70] The formulation of the Commonwealth's enumerated powers was based on the American Constitution, and the publication of James Bryce's book 'The American Commonwealth' in 1888 also heavily influenced the framers during the *Convention Debates*.[71]

The *Constitution's* division of powers between localised State governments and a central government upholds the freedom and liberty of individuals[72] as a type of 'double security'.[73] This has been recognised by High Court judges. Kirby J has observed that '[federalism] is a feature that tends to protect liberty and to restrain the over-concentration of power which modern government…tend[s] to encourage'.[74] Former Chief Justice Sir Harry Gibbs also endorsed the view of Lady Ursula Hicks that federalism is 'inherently democratic', noting '[t]he division of power which [federalism] involves is a more effective check on the abuse of governmental power than any bill of rights can ever be'.[75] Some have noted that the framers of the *Constitution* did not, and the text of the *Constitution* does not, contemplate liberty or mutual frustration as a purpose or value of Australia's federalist system.[76] Regardless of whether Australia's conception of

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[70] Augusto Zimmermann and Lorraine Finlay, 'Reforming Federalism: A Proposal for Strengthening the Australian Federation' (2011) 37(2) *Monash University Law Review* 190, 200 citing Nicholas Aroney, 'Federalism and the Formation of the Australian Constitution' in Greg Fraser (ed),
Democracy Down Under: Understanding Our Constitution (Presbyterian Church of Victoria, 1997) 17.

[71] Stephen Gageler, 'The federal balance' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 27, 30.

[72] Geoffrey de Q Walker, *Ten Advantages of a Federal Constitution and How to Make the Most of Them*
(The Centre for Independent Studies, 2001) 11.

[73] Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17(3) *Federal Law Review* 162, 166, citing *Alexander Hamilton, James Madison and John Jay, The Federalist Papers* (New American Library, 1st ed, 1961) 323.

[74] *New South Wales v Commonwealth* (2006) 229 CLR 1, 245 [612].

[75] Harry Gibbs, 'Decline of Federalism' (1994) 18 *University of Queensland Law Journal* 1, 7, citing Ursula K Hicks, *Federalism: Failure and Success A Comparative Study* (Palgrave MacMillan, 1st ed, 1978) 4.

[76] Colette Mintz, 'From NFIB to Williams: A Principled Prohibition on Coercion for Australian Federalism' (2018) 29(1) *Public Law Review* 47, 58 citing S Gageler, 'Beyond the Text: A Vision

federalism was specifically intended to contemplate these principles, it is indisputable that the protection of individual liberty from state oppression is an inherent part of any system of federalism,[77] and its practical result is to be a 'buttress of liberty, [and] a counterweight to elitism'.[78]

This understanding of federalism is also characterised as traditional for chronological reasons – for cooperative federalism has risen to prominence as an understanding of federalism in recent decades. The jurisprudence of the early High Court mirrored the traditional understanding of federalism. The High Court's initial emphasis on federalism in drawing implications from the *Constitution* involved two doctrines which limited Commonwealth power – the *implied immunity of instrumentalities*, and the *reserved state powers* doctrines. The former doctrine held that the Commonwealth and States were immune from the legislation of one another.[79] This was an implication from the notion of federalism and the federalist structure embedded in the *Constitution*.[80] The latter doctrine provided that the heads of Commonwealth legislative power were to be construed in such a manner that did not serve to limit powers which were deemed as 'reserved' to the States.[81]

Following this, however, there was a steady erosion of both doctrines until the High Court's decision in the *Engineers Case* did away with the implied immunity of instrumentalities and reserved state powers doctrines. [82] This decision laid the groundwork for the expansion of Commonwealth legislative power in the century since. The High Court's reliance on legalism (cf. the view that the *Engineers* decision relied upon implications from the system of responsible government and

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of the Structure and Function of the Constitution' in N Perram and R Pepper (eds), *The Byers Lectures 2000–2012* (Federation Press, 2012) 195, 203.
[77] de Q Walker (n 72).
[78] Ibid 53.
[79] *D'Emden v Pedder* (1904) 1 CLR 91; *Deakin v Webb* (1904) 1 CLR 585.
[80] Ibid.
[81] *R v Barger* (1908) 6 CLR 41; *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.
[82] See, for example: *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 485.

indivisibility of the Crown[83]) has meant that drawing broad implications from the structure of the *Constitution* regarding federalism is resigned to jurisprudential history, allowing the Commonwealth to bind the States via legislation in certain areas, such as by covering the field,[84] upheld by virtue of inconsistency under s 109. Professor Nicholas Aroney has contested that the decision in *Engineers,* which is purported to have reflected the growing national sentiment at the time of its judgment, did not do so in actual fact. In response to an argument that, in addition to the use of legalist methods, the Court relied upon functionalist interpretation which focused on 'social and political values and consequences' to give rise to an evolving federalism,[85] Aroney argues that nationalist sentiment at the time has been overstated, and that it was contested as part of a long-running debate stemming from the *Convention Debates.* The point is made that the eventual dominance of the view propounded by Isaacs and Higgins JJ over that of the original members of the Court was a representation of a change in opinion of 'the rarefied atmosphere of Australia's highest judicial body' which was not necessarily reflective of 'a 'generational' change in public attitudes regarding the powers and functions of the Commonwealth'.[86] Public sentiment at the time cannot be ascertained from a broad-brush view of history, and Aroney advances that this must be considered in light of the unsuccessful referendums held in 1911, 1913, 1919 and 1926 regarding expanded Commonwealth legislative powers, jostling between the Commonwealth and the States regarding the Spanish flu, and a majority of Western Australians voting in favour of secession in 1933.[87]

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[83] Geoffrey de Q Walker, 'The Seven Pillars of Centralism: Engineers' Case and Federalism' (2002) 76 *Australian Law Journal* 678, 691.
[84] *Clyde Engineering Co v Cowburn* (1926) 37 CLR 466.
[85] Nicholas Aroney, 'Three Key Issues Arising Out of the Engineers Case: A Reply' (2021) 95 *Australian Law Journal* 25, 30 citing Rosalind Dixon and Brendan Lim, 'The Continued Legacy of the Engineers Case: A Dynamic Approach to Federal Power' (2020) 94 *Australian Law Journal* 841, 842–843.
[86] Aroney (n 85) 31.
[87] Ibid.

Further decisions of the Court leading to centralisation involve the grants power,[88] the external affairs power[89] (subsequently relied upon by the Commonwealth to legislate in areas that are within the remit of the States) which arguably 'proceeds without regard to…the federal character of the Constitution',[90] and the corporations power[91] (allowing the amendment of the *Workplace Relations Act 1996* (Cth) on that basis).

Whilst federalism has a textual and implicative foundation in the *Constitution*, its application in the political sphere has been subject to imbalance. There has been a gradual centralisation of legislative responsibility in the Commonwealth which, as per Windeyer J's oft-cited description, has been 'consolidated in war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations'.[92] Prior to the time of that statement, World War I and World War II had caused a centralisation towards the Commonwealth, best encapsulated through the 'uniform tax schemes', approved by the High Court in *South Australia v Commonwealth*[93] and *Victoria v Commonwealth ('Uniform Tax Cases').*[94] The combined effect of these two cases on Australia's federal system of taxation is that by parking the income taxation power in the hands of the Commonwealth, this has resulted in a 'vertical fiscal imbalance' in the revenue-raising capability of the Commonwealth and the service delivery of the States.[95] It has been remarked that 'in the financial sphere the Commonwealth has achieved a position of dominance over the States – facts which are reflected in the much greater interest displayed in federal politics than

[88] *Victoria v The Commonwealth* (1957) 99 CLR 575.
[89] *Koowarta v Bjelkie-Peterson* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1.
[90] *Richardson v Forestry Commission* (1988) 164 CLR 261, 298 (Wilson J).
[91] *NSW v Commonwealth* (2006) 229 CLR 1.
[92] *Victoria v Commonwealth* (1971) 122 CLR 353, 395–396 (Windeyer J).
[93] (1942) 65 CLR 373.
[94] (1957) 99 CLR 575.
[95] See Alan Fenna, 'Commonwealth Fiscal Power and Australian Federalism' (2008) 31(2) *University of New South Wales Law Journal* 509.

in State politics'.[96] The effect of this financial dominance on the recent increase in the use of the referral power cannot be overstated. Ross Anderson, commenting around 70 years ago, reflected upon the lacklustre usage of the referral power to that point. He speculated, however, that the first *Uniform Tax Case* decided in the decade prior would provide an impetus for a re-invigoration in the use of the referral power.[97] As a consequence of the first *Uniform Tax Case*, the 'overwhelming financial dominance' of the Commonwealth meant that the prior dynamics of negotiation in persuading States to make referrals between 'seven roughly equal parties' had been consigned to history.[98] Anderson's observation, that the ability of the Commonwealth to financially induce States through the bait of financial grants under s 96 of the *Constitution* would entrench it in a superior negotiating position, has proven to be true in the following seven decades (and not just in relation to referrals). Whilst s 96 may not have been used as an explicit inducement, its effect has been to implicitly remove the States 'as equal political partners with the Commonwealth' and allowed the Commonwealth to increase its federal powers 'when the political atmosphere is favourable' to do so – which it has been for many decades now.[99]

The World Wars in combination facilitated a long-lasting cohesiveness in Australia's national identity. It is clear that the 'the two World Wars contributed a tremendous stimulus' to the preponderance of attention being allocated to Commonwealth powers and activities over its State counterparts.[100]

B *Cooperative Federalism*

Cooperative federalism has been used to describe 'a range of mechanisms to manage the conflict, duplication, costs and inefficiencies that can arise in the operation of a federation' which Robert French has asserted as being important to

[96] Anderson (n 27).
[97] Ibid 3.
[98] Ibid.
[99] Ibid.
[100] Ibid 1.

the 'effective functioning of the federation'.[101] Sitting alongside traditional federalism, the other main conception of federalism which characterises it as a constitutional assumption and informs the political practice of Australia's State and Commonwealth governments is cooperative federalism. Cooperative federalism is characterised by the partnership between different levels of government to overcome the structural divisions of power in order to remove inefficiencies and achieve outcomes they may not be able to by themselves.[102] Cooperative federalism is an effective force in Australia for responses to issues of national concern. As exemplified by the COVID-19 pandemic, discussed below, the specialised local knowledge of the States has been used in concert with the Commonwealth to successfully suppress COVID-19 cases and deaths at a relatively low level compared to the vast majority of other nations. However, another practical consequence of cooperative federalism has been the increasing utilisation of the referral power.

On the one hand, cooperative federalism has been labelled a political mantra employed by governments in formulating policy. In *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, in determining the application of cooperative federalism to constitutional interpretation, McHugh J stated that it is not a form of federalism which can be discerned from the *Constitution* – '[i]t is a political slogan, not a criterion of constitutional validity or power'.[103] Robert French has labelled McHugh J's characterisation as 'disturbing'.[104] In *Re Wakim*, the constitutional validity of general and corporations cross-vesting schemes (under provisions of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) and the *Corporations Act 1989* (Cth), with equivalent State and Territory legislation) was called into question before the High Court on the basis that they impermissibly purported to give the Federal Court of Australia the ability to exercise State jurisdiction. A pre-

[101] French, 'Co-operative federalism - a constitutional reality or a political slogan' (n 3).
[102] Rosalind Dixon, *Australian Constitutional Values*, (Hart Publishing, 1st Ed, 2018) 397–399.
[103] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 556 [54].
[104] French, 'Co-operative federalism - a constitutional reality or a political slogan' (n 3).

cursor to the *Corporations Act 2001* (Cth) (‘*Corporations Act*’), the corporations cross-vesting scheme (‘*Corporations Law*’) permitted any State or Territory Supreme Court, and the Federal Court, to hear matters relating to corporations outside their jurisdiction. The validity of the scheme was rejected by the High Court largely on the basis that the *Constitution,* and in particular Chapter III, could not be overridden by a legislative scheme and any level of cooperation between the Commonwealth and the States. Chapter III was held to be an exhaustive statement of the original jurisdiction of federal courts in Australia.

The Court did not, however, expressly reject the principle and its applicability in other contexts. Much is often made of McHugh J's comments in *Re Wakim* declaring cooperative federalism as a 'political slogan'.[105] Cooperative federalism is arguably an inherent feature of the *Constitution* which in the appropriate circumstances can inform its interpretation. Robert French has referred to various 'textual markers' within the *Constitution* where the Commonwealth's powers can facilitate cooperative federalism, such as the power to invest a State court with federal jurisdiction.[106] In addition, French has noted that cooperative federalism has been used in part in recent times as an 'extra-constitutional' tool driven by political imperatives, [107] as its delivery exists in cooperation between executive governments more so than through constitutional empowerment.

C *Cooperative Federalism and the Referral Power*

Cooperative federalism is a principle which is important for the cohesion and efficient operation of Australia's federation. Robert French has noted that the use of the referral power is a 'technique' of cooperative federalism, in combination

[105] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 556.
[106] Ibid.
[107] Robert French, 'The incredible shrinking federation: voyage to a singular state?' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 39, 63 ('*The incredible shrinking federation*').

with intergovernmental agreements and executive cooperation.[108] However, this article contends that the placitum does not necessarily directly accord with cooperative federalism, and is not the most appropriate expression of cooperative federalism because the political accountability associated with a referral is targeted solely at the Commonwealth, the level of government tasked with administering the legislation that is the subject of a referral. This situation can hardly be said to be cooperative where it is only the Commonwealth Government that bears the political ramifications associated with administering the legislative scheme, whilst the relevant State government(s) avoids accountability.

The meaning of constitutional provisions can be informed by the *Convention Debates*, as determined by the High Court in *Cole v Whitfield*.[109] Given the *Constitution* is a statute, the basic principles of statutory interpretation are to be considered. The discussions at the *Convention Debates* are relevant in determining the objective meaning of the referral power, rather than the subjective intentions of the framers, with the history of constitutional provisions being relevant 'for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged'.[110] Before federation, the discussion of the referral power at the *Convention Debates* predominantly centred on its potential usage. At the forefront of the framers' minds was that the power could be applied to resolve issues concerning a few States.[111] This proposition is quite different to a national law of uniform application, for which the power has predominantly been used in recent decades. As noted by Andrew Lynch, contributions such as these shaped much of the discussion surrounding referrals at the *Convention Debates*.[112]

[108] Ibid 47–48.
[109] 165 CLR 360.
[110] Ibid 385.
[111] *Convention Debates* (n 50) 220 (Sir John Downer).
[112] Lynch, *After a Referral* (n 56) 367.

Concurrently, the meaning of the *Constitution* is also not limited to that contemplated by the founders – it is an instrument of government to guide the long future of Australia, and can accordingly cover a range of circumstances not entirely obvious from the framing of its terms.[113] The referral power has been used increasingly more, from the 1980s, as Australia's place in the world has changed and the need for national approaches to issues has increased.[114] For example, the referrals which facilitated the enactment of the *Corporations Act* were necessary to ensure that Australia's regulation of corporations was not out of step with the world, from an economic standpoint, in the twenty-first century.[115] The failed attempt at establishing a cross-vesting scheme in *Re Wakim* was the catalyst for the referral. The *Corporations Act* operates so as to allow the Federal Court to hear matters which were within the remit of State law. The diminishing viability of cooperative schemes under the *Corporations Law* was compounded by the Court's decision in *R v Hughes*,[116] in which it considered whether the Commonwealth Director of Public Prosecutions had power to prosecute offences under State corporations law. Whilst the High Court upheld the ability of the Commonwealth Director of Public Prosecutions to do so on the basis of being supported by the trade and commerce power and external affairs power, its decision left an area of doubt over whether heads of power supported other aspects of the *Corporations Law*. As such, the implementation of the *Corporations Act* removed the stop-gap provisions and legal challenges throughout the 1990s. Professor Cheryl Saunders has noted that a national law means '[t]here is no room for uncertainty about which

[113] *Sue v Hill* (1999) 199 CLR 462, 487–488; *Singh v Commonwealth* (2004) 222 CLR 322, 334 (Gleeson CJ).
[114] French, 'The incredible shrinking federation' (n 107) 40–41.
[115] Attorney General's Department (Cth), 'Measures To Address Wakim And Hughes: How The Referral Of Powers Will Work' (Paper presented at the Corporate Law Teachers Association Conference 'The Future of Corporate Regulation: Hughes and Wakim and the Referral of Powers', 3 November 2000) 1 <https://law.unimelb.edu.au/__data/assets/pdf_file/0019/1710163/132-govey1.pdf>.
[116] (2000) 202 CLR 535.

Evidence Act applies or whether Commonwealth officers can be invested with power. There is no need to artificially "federalise" the law.'[117]

However, the use of the referral power does not occur in a vacuum. Of central importance is whether the practice of referral is even cooperative by its very nature. Cooperation has been defined as 'the act of working together'.[118] It is true that the States and Commonwealth work in tandem when formulating the exact nature of the referral to be made, and the enacting legislation. However, past the point of enactment of the Commonwealth legislation giving effect to a referral, the role of the States is minimal in determining how the referred matter is governed and enforced. Whilst there are minimum thresholds in place which ensure that the States have input when it comes to the amendment of referred legislation, the States have very little input on the day-to-day enforcement of such legislation. Professor Cheryl Saunders has noted that the referral power necessitates the Commonwealth exercising its own power in enacting and overseeing legislation, and '[g]enuine consultation and co-operation' under a regulatory scheme across States 'may be even more difficult to achieve' than under uniform legislation enacted by the States.[119] It must be remembered that the referral of a matter represents, for all intents and purposes, a cession of political accountability on the part of a State regarding the referred matter. Once legislation is under the guise of Commonwealth responsibility, it is difficult to argue that States will bear any political ramifications for the governance of that legislation. On this basis, how can something be truly cooperative where one party bears almost all of the political accountability arising from it?

D *The response to COVID-19*

The occurrence of the COVID-19 pandemic, for all of its misery, has led to a re-appreciation of the role of federalism in policy formulation in Australia through

[117] Saunders (n 11) 282.
[118] Cambridge Dictionary (online at 14 August 2022) 'cooperation'.
[119] Saunders (n 11) 282–283.

its exhibition of the practical benefits of true cooperative federalism. The State-based approach in dealing with COVID-19 has illustrated the dynamism of federalism in allowing government to respond to a crisis affecting the nation. The utilisation of 'lockdowns' – described, for the purposes of this article, as government-enforced limitations placed on individual liberties and privately-run businesses – was the hallmark of the response by State governments to the COVID-19 pandemic (prior to the creation and mass-adoption of vaccination) in order to protect public health.

The value of federalism in these circumstances was exemplified by the decision-making of State governments in choosing when to enact a lockdown, which can be appropriately adapted to the local circumstances of each state.

When measured against the goal of aggressive suppression of community transmission of COVID-19, it is clear that the States have been successful in achieving this aim in order to reduce the risk of death whilst the population was mass-vaccinated. Whilst regrettably there have been spikes in cases of COVID-19 throughout the pandemic in Australia, when compared with the rest of the world, case rates and, importantly, death rates, remained staggeringly low during the height of the pandemic.[120]

The ability to enact and enforce a lockdown is most clearly supported by the plenary powers of the States to legislate with respect to health, and law and order. Such powers provide support for the delegation of directions, in the form of Public Health Orders, made as an executive instrument by the minister responsible. Whilst there are valid concerns as to the impact on individual rights by the unfettered issuance of executive instruments, they have proven critical in allowing State governments to respond with agility to an ever-evolving public health crisis.

[120] McKinsey & Company, 'Collaboration in crisis: Reflecting on Australia's COVID-19 response', (Web Page, 15 December 2020) <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/collaboration-in-crisis-reflecting-on-australias-covid-19-response>.

The overall effect of this legislative arsenal is that States have been permitted to respond to local situations as they develop and as they see fit. As pointed out by Professor Anne Twomey, '[p]rior to the pandemic, there were a significant number of intergovernmental agreements, plans and frameworks in place to deal with emergencies, including a pandemic'[121] in order to facilitate inter-governmental cooperation, such as the National Security Health Agreement 2008 which sets out 'Commonwealth and State responsibilities concerning health emergencies and established a national coordination framework'.[122] Professor Twomey correctly noted that '[w]hile there had been a great deal of preparation for a pandemic, nothing can completely prepare for the exact situation that occurs'.[123] As such, a new set of cooperative agreements were established, such as the 'National Coordination Mechanism' in March 2020 and the 'National Partnership on COVID-19 Response', agreed on 13 March 2020.[124] Likewise, a National Cabinet of the Commonwealth, States and Territories was established in March 2020, and made permanent in replacement of the Council of Australian Governments forum in May 2020, to respond to the evolving COVID-19 crisis. Professor Cheryl Saunders remarked in July 2020 that 'National Cabinet deserves considerable credit for the (so far) very effective response' to COVID-19 which struck 'a balance between collective action and tailored responses'.[125] The National Cabinet has led to 'for a time at least party political decision-making [being] eschewed in favour of engaging collaboratively with what was a national emergency'.[126] Whilst a ruling of the Administrative Appeals Tribunal in 2021 would permit documents

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[121] Anne Twomey, 'Multi-Level Government and COVID-19: Australia as a case study', *University of Melbourne* <https://law.unimelb.edu.au/__data/assets/pdf_file/0003/3473832/MF20-Web3-Aust-ATwomey-FINAL.pdf> 2 ('*Multi-Level Government and COVID-19*').
[122] Ibid.
[123] Ibid.
[124] Ibid.
[125] Cheryl Saunders, 'A New Federalism? The Role and Future of the National Cabinet', *University of Melbourne* (1 July 2020) < https://government.unimelb.edu.au/__data/assets/pdf_file/0011/3443258/GDC-Policy-Brief-2_National-Cabinet_final01.07.2020.pdf>.
[126] Ian Freckelton, 'COVID-19 as a Disruptor and a Catalyst for Change' (2021) 28 *Journal of Law and Medicine* 597, 610.

before the National Cabinet to be subject to applications for access under the *Freedom of Information Act 1982* (Cth), there have been no signs that the workings of the National Cabinet have been impacted upon because of this ruling.[127] If anything, the efficacy of the National Cabinet has only decreased as a result of a diminution in the intensity of the COVID-19 pandemic (with respect to its prevalence in the public consciousness, rather than in terms of case numbers). The coordinated approach between the States and Commonwealth to COVID-19 has facilitated the States' ability to enact public health measures, and conduct effective enforcement of those measures. In this way, the COVID-19 pandemic has illustrated the benefits of cooperative federalism. This is an example of the dynamic nature of federalism in facilitating intergovernmental partnership.

Further, the State-based approach to COVID-19 is consistent with the principle of subsidiarity. The success of States in attaining aggressive-suppression and/or elimination of community transmission of COVID-19 is a practical example of the benefits of the principle that the most local level of decision-making should be adopted where appropriate to reflect the will of those most directly impacted.[128] The residents in each State have benefited from governments that formulate policy which is closest to their constituents, and understand the workings of their State hospital and school systems. For example, Professor Twomey has pointed out that States were able to 'decide whether schools should close, and if so when, because each of the States and Territories have different school systems, different holiday periods and were facing different levels of risk'.[129] In the more short-lived experience of the H1N1 influenza pandemic from 2009 to 2010, it was observed that subsidiarity was applied in Australia through the selective closure of schools

[127] *Patrick and Secretary, Department of Prime Minister and Cabinet* [2021] AATA 2719.
[128] Michelle Evans and Augusto Zimmermann, 'The Global Relevance of Subsidiarity: An Overview' in Michelle Evans and Augusto Zimmermann (ed 1), *Global Perspectives on Subsidiarity* (Springer Netherlands, 2014) 1, 1–3; Oxford University Press, *Max Planck Encyclopedias of International Law* (online at 14 August 2022) Subsidiarity.
[129] Anne Twomey, *Multi-Level Government and COVID-19* (n 121) 6.

or responses to specific populations.[130] During that saga, and in a similar manner to Australia's response to the COVID-19 pandemic, a reliance on different management plans 'proved to be responsive and robust bases for managing pandemic risks' on the basis they provided 'frameworks for coordination rather than prescriptive straightjackets'.[131]

In combating COVID-19, States have been best placed to understand the geographic components of their cities and regions, and in turn how to limit the spread of the virus. For example, New South Wales enacted a lockdown of the Northern Beaches Council area of Sydney to contain COVID-19,[132] which is (in relative terms) separated geographically from other parts of Sydney. Furthermore, States will have a more nuanced understanding of their local hospital capacities, particularly as they relate to areas which contain concentrated pockets of COVID-19. Accordingly, policy has been formulated by those who live in the communities affected and 'understand those needs'.[133] Professor Twomey has further elaborated on the success of federalism in containing COVID-19, stating '[t]here are people alive today wandering around today, probably complaining about the federal system, who are alive only because of the federal system'.[134]

It is true that consistency between jurisdictions, in the appropriate circumstances, is desirable. It was noted just over a decade ago that '[t]here is a growing sense that the nation's laws should reflect national standards and, unless there is good reason, the law should be substantially the same everywhere in the

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[130] Terry Carney, Richard Bailey and Belinda Bennett, 'Pandemic planning as risk management: How fared the Australian federation?' (2012) 19 *Journal of Law and Medicine* 550, 553.
[131] Ibid 552.
[132] See: Mostafa Rachwani, 'Northern beaches lockdown to be lifted as NSW records four new Covid cases and Victoria none', *The Guardian* (Online, 8 January 2021) <https://www.theguardian.com/australia-news/2021/jan/08/northern-beaches-lockdown-to-be-lifted-as-nsw-records-four-new-covid-cases-and-victoria-none>.
[133] Anne Twomey and Glenn Withers, 'Federalist Paper 1 Australia's Federal Future: Delivering Growth and Prosperity', (April 2007) <https://www.caf.gov.au/Documents/AustraliasFederalFuture.pdf> 10.
[134] Jacqueline Maley, 'Armed patrols, complacency and COVID-19: Has Australia bungled the pandemic?', *The Sydney Morning Herald* (Online, 15 July 2021) <https://www.smh.com.au/politics/federal/armed-patrols-complacency-and-covid-19-has-australia-bungled-the-pandemic-20210715-p589zo.html>.

Commonwealth.'[135] However, national standards are not inherently desirable where the status quo already operates effectively to meet public health goals. It has been argued that due to the Commonwealth not having power in relation to public health powers, apart from quarantine, 'Australia's federal legal system therefore has the potential to complicate responses to emergency situations'.[136] Comments made in 2004 were referred to in support of this proposition, which observed that 'it is time to look at the efficiency of the emergency powers laws of Australia as a whole: to map the laws in each jurisdiction and the Commonwealth quarantine laws and to consider their effectiveness in the face of the outbreak of a fast moving, easily spread infectious disease'.[137] Nearly two decades is a long time. Throughout the COVID-19 pandemic, the common goal of the States to aggressively suppress and/or eliminate community transmission has been consistent, and led to lower cases and deaths than the vast majority of the world, to the extent that one goal formulated by the Commonwealth has not been necessary.

Finally, the borrowing of a test from the nationhood power under s 61 of the *Constitution* is useful for illustrating why a national approach to a matter of national importance is not always necessary. In determining whether the nationhood power is validly engaged to support Commonwealth intervention, it has been considered relevant whether national, rather than local planning, is necessary for the carrying out of the action.[138] The national crisis that is the COVID-19 pandemic has illustrated that localised responses can be very effective in meeting stated policy goals, rendering any national response nugatory. The responses of the States have protected public health in such a manner that Australia

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[135] McGinty (n 29) 87.
[136] Belinda Bennett, Terry Carney and Richard Bailey, 'Emergency Powers & Pandemics: Federalism and the Management of Public Health Emergencies in Australia' (2012) 31(1) *University of Tasmania Law Review* 37 <http://classic.austlii.edu.au/au/journals/UTasLawRw/2012/2.html#Heading39>.
[137] Ibid citing Genevieve Howse, 'Managing Emerging Infectious Diseases: Is a Federal System an Impediment to Effective Laws?' (2004) 1 *Australian and New Zealand Health Policy* 1, 3.
[138] *Victoria v The Commonwealth* (1975) 134 CLR 338, 412–13 (Jacobs J).

as a whole has benefited in limiting COVID-19 deaths at a much better rate than the vast majority of other nations. Accordingly, true cooperation between the different parts of the Commonwealth has exemplified the benefits of refraining from leaping to a centralisation of power in the Commonwealth.

IV TENSIONS BETWEEN THE REFFERAL POWER AND FEDERALISM

A *Referral – Symptomatic of Centralisation*

The process of centralisation, bar outliers such as the response to COVID-19, has entrenched the Commonwealth as the dominant actor in the federation. This is to the detriment of the States which have experienced an erosion of their influence. As such, a structural power imbalance has arisen which has increased the Commonwealth's ability to facilitate referrals. First, in relation to the structural imbalance, amongst other centralising factors the High Court's interpretation of the taxation and grants power has led to a vertical fiscal imbalance, whereby the States are dependent upon the Commonwealth for grants, which can necessarily be tied to areas of expenditure. Secondly, this serves to reinforce the already vertical nature of the relationship between the levels of government, and arguably bolsters the Commonwealth's bargaining position when seeking to engage States in matters of referral.

B *Role of the Referral Power in Centralisation*

The referral power has indeed proven to be a 'free and easy method'[139] of amendment to the *Constitution* which has aided the Commonwealth's ability to expand its legislative agenda.

The placitum, however, was not enshrined in the *Constitution* without reason. As noted, in individual circumstances it can provide the States and Commonwealth

[139] *Convention Debates* (n 50) 218 (John Quick).

with a mechanism with which to respond to matters efficiently, such as adapting to changing international economic conditions.

Robert French has listed the referral power as an example of cooperative federalism.[140] Whilst ostensibly the communication and coordination involved in the referral of matters by States is in some sense cooperation, the actual effect of a referral cannot be said to be cooperative. The indefinite referral of a matter within the legislative remit of a State does not involve cooperation, when afterwards the State cedes practically all political responsibility related to that matter.

1 *Political Accountability and Federalism*

The justifiability of referrals on the basis of cooperative federalism is questionable on the basis that States' accountability to their constituents is ceded once a referral is made. State governments play no further part in the formulation of legislation and subsequent enforcement of legislative schemes. Regardless of whether a referral is intended to detract from political criticism in an individual case, a steady erosion of a State's accountability to its constituents can occur where referrals are unnecessarily relied upon and overused.

The Supreme Court of the United States has employed the notion of coercion to ensure that State rights are not unduly encroached upon by the Federal Government. Collette Mintz has inquired into the potential for this principle to be extended in the Australian context. Mintz has noted that the High Court relied upon coercion to some extent in *Williams v Commonwealth*[141] to limit the Commonwealth executive's encroachment on areas of State responsibility without proper legislative checks.[142] In particular, Mintz posits that coercion can be deployed in the Australian constitutional context through a principle of 'political

[140] French, 'Co-operative federalism - a constitutional reality or a political slogan' (n 3).
[141] (2012) 248 CLR 156.
[142] Colette Mintz, 'From NFIB to Williams: A Principled Prohibition on Coercion for Australian Federalism' (2018) 29(1) *Public Law Review* 47, 48.

community'.[143] States have political constituencies to which they must continue to be held accountable. It is a feature of the *Constitution's* history and structure in a manner reflective of the United States Constitution, with the distinction being the 'unique Australian fusion of federalism and responsible government'.[144] Mintz notes that '[b]y disrupting the representative relationship between citizens and their State governments, coercion destroys what makes States distinct from local bureaucratic offices of the national government.'[145]

The principle of political community, as a feature of the *Constitution*, buttresses the argument that referrals should only be relied upon by governments as a point of last call. By referring any legislative matter to the Commonwealth as a knee-jerk reaction, States can easily circumvent political accountability to their constituents. The constitutionality of referrals in Australia is not in question. Rather, this argument is a call to exercise restraint in relation to an over-reliance on referrals by appealing to notions of accountability to one's constituents.

A broader framework which provides theoretical support to the polity's use of the referral power as a tool of last resort is the principle of subsidiarity, which asserts that the lowest level of governance possible should be utilised in dealing with governmental matters. Subsidiarity is described in the Oxford English Dictionary as the principle that 'a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level'.[146] As noted, subsidiarity facilitates popular sovereignty by prioritising individuals' rights to have issues which affect their community dealt with by the government closest to them.[147] It has become more often used in

[143] Ibid 59–60.
[144] Ibid.
[145] Ibid 57.
[146] This definition was relied on by the New South Wales Court of Appeal in *Hunters Hill Council v Minister for Local Government* (2017) 224 LGERA 1, 18.
[147] Michelle Evans and Augusto Zimmermann, 'The Global Relevance of Subsidiarity: An Overview' in Michelle Evans and Augusto Zimmermann (ed 1), *Global Perspectives on Subsidiarity* (Springer Netherlands, 2014) 1, 1–3; Oxford University Press, *Max Planck Encyclopedias of International Law* (online at 14 August 2022) Subsidiarity.

federalist systems on the basis that it is best placed to protect individual autonomy and notions of sovereignty.[148] The principle recognises that the accumulation of power at a higher, more abstract level is undesirable to local communities that seek to retain their own democratic governance and shared autonomy. It is a principle of international law, to the extent that it is a principle under European Union law which upholds the role of member States in decision-making.[149] Subsidiarity was formally introduced into the Treaty establishing the European Economic Community (the Treaty of Rome) by the Treaty on European Union (the Maastricht Treaty) (art 3(b)),[150] as follows:

> '[i]n areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.'

Subsidiarity is a principle of European governance,[151] with one of the main reasons for its prominence being to minimise an unnecessary centralisation of power in the European Union,[152] particularly in light of growing areas of competence, and existing areas being 'expanded through treaty amendment or judicial interpretation'.[153]

Emeritus Professor Geoffrey de Q Walker has posited that federalism promotes competition between States, which in turn may lead to better outcomes for the nation as a whole.[154] In support of this, it is illustrated that competitive federalism

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[148] Oxford University Press, *Max Planck Encyclopedias of International Law* (online at 14 August 2022) Subsidiarity [3].
[149] Ibid [8].
[150] As described in *Leask v Commonwealth* (1996) 187 CLR 579, 600 (Dawson J).
[151] Kees van Kersbergen and Bertjan Verbeek, 'Subsidiarity as a Principle of Governance in the European Union' (2004) 2 *Comparative European Politics* 142.
[152] Paul Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) 50(1) *Journal of Common Market Studies* 72, 73.
[153] Ibid.
[154] Geoffrey de Q Walker, 'Ten Advantages of a Federal Constitution' (1999) 73 *Australian Law Journal* 634, 651.

has improved the position of China in the world economic sphere, and enhanced Australia's reputation in the trucking industry by virtue of increased domestic competition flowing from the High Court's interpretation of s 92 of the *Constitution*.[155] De Q Walker refers to the framework put forth by Emeritus Professor Wolfgang Kasper in 1993 in arguing for the adoption in Australia of four conditions which constitute competitive federalism.[156] The first of which, subsidiarity, is described by Kasper as being justifiable if there are 'proven welfare gains', such as where there are 'strongly shared common interests' or when 'a diversity of rules would cause high and avoidable transaction costs'.[157]

Whilst subsidiarity is not an implication of the *Constitution*, the principle should be considered as a *raison d'être* by States in protecting their political accountability to their constituents and the legislative agendas of future State Parliaments. There are limited examples of Australian governments considering subsidiarity in formulating cross-border policy. There was some promise shown in 1997 in relation to environmental protection, with the Council of Australian Governments agreeing to the 'Heads of Agreement on Commonwealth and States Roles and Responsibilities for the Environment'. The Heads of Agreement set out the allocation of responsibility for environmental protection between the three tiers of government in Australia according to significance on a world, national or local scale. It has been noted that this structure is 'in keeping with principle of subsidiarity' and led to local government bearing much of the responsibility for protection and assessing heritage significance.[158] The Productivity Commission has observed that, in line with subsidiarity, 'local heritage conservation reflects the

[155] Ibid.
[156] Ibid.
[157] Wolfgang Kasper, 'Making Federalism Flourish' (1993) 2 *Upholding the Australian Constitution* 79.
[158] Matthew Baird, 'The end of Hope? An assessment of the draft report of the Productivity Commission's inquiry into the conservation of Australia's heritage places' (2006) 11 *Local Government Law Journal* 200, 203.

willingness to conserve of that community'.[159] In determining whether to refer a matter as a tool of last resort, it is relevant that the role of subsidiarity is lessened where economic efficiency calls for a consistent approach. For example, on an economic cost-benefit analysis – such as 'when the benefits of acting in common outweigh preference heterogeneity' – it will be more efficient for higher-level decision making to take responsibility over an issue.[160] On the basis of economies of scale, such as where policies are costly for different actors to enact and oversee them, the combination of resources may act to diminish such costs.[161]

2 Inter-temporal Equivalence

The manner in which the referral power has been used undermines the ability of State Parliaments across different terms to freely pursue their own policy agenda. This occurrence stands in conflict with the constitutional value of inter-temporal equivalence posited by Professor Michael Detmold, which asserts that one State Parliament should not bind a successor State Parliament.[162] Put another way, the electors of a particular State Parliament ought to be as equally represented as the electors of previous State Parliaments through having their representatives be able to legislate in a manner reflective of their will and electoral mandate.

The lack of consideration for this principle in Australia's polity has contributed to the centralisation of power in the Commonwealth. State Parliaments have bound their successors to referrals of power that deny them of various legislative competencies within their plenary power. Regardless of the ability to repeal referral legislation, or the lack thereof, the practical and political difficulties evidently are too high of a disincentive for successor State Parliaments to attempt

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[159] Australian Government Productivity Commission, Conservation of Australia's Historic Heritage Places Productivity Commission Inquiry Report (6 April 2006) <https://www.pc.gov.au/inquiries/completed/heritage/report/heritage.pdf> 101.
[160] George Gelauff, Isabel Grilo and Arjan Lejour, 'Subsidiarity for Better Economic Reform?' in George Gelauff, Isabel Grilo and Arjan Lejour (eds) *Subsidiarity and Economic Reform in Europe* (Springer, 2008) 4.
[161] Ibid.
[162] Detmold (n 7).

to repeal referral legislation. Withdrawal from a nation-wide legislative scheme would involve a State having to justify that the logistical issues involved in re-establishing State regulation and the relevant enforcement mechanisms outweigh the benefits of remaining part of a referred scheme. Political pressure from other States, the Commonwealth and internally to remain as part of a consistent, national scheme would also be steadfast.

It may be argued that referrals by States represent their political will, and by virtue of their voluntary assent to a cooperative legislative agenda, the creeping centralisation which follows is justifiable as consistent with cooperative federalism. However, in addition to a lack of regard for political accountability, this argument fails to consider the will of future State Parliaments which are subject to the political and practical restrictions that flow from a referral. The voluntary assent of a State Parliament at a particular point in time does not pay regard to the consequences that this has on the ability of future State Parliaments to alter such a policy decision.

3 Cumulative Centralisation

The justifiability of individual referrals also ought not be the arbiter of whether the use of the power is consistent with federalism. Rather, it is the *cumulative* effect which the consistent application of the referral power has had in transferring key matters into the hands of the Commonwealth that must be considered. Such a theory of cumulative effect has been considered in other constitutional law contexts. Dixon and Landau have posited that '[c]onstitutional changes that, by themselves, may not pose any significant threat to democracy may become far more threatening in combination, or in aggregate'.[163] Specifically, constitutional amendments which are achieved through democratic processes have a cumulative anti-democratic impact inconsistent with 'constitutional aims', such as by

[163] Rosalind Dixon and David Landau, 'Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment' (2015) 13(3) *International Journal of Constitutional Law* 606, 625.

removing executive oversight provisions and extending terms in office for leaders.[164] These changes evade constitutional oversight due to their 'piecemeal' nature.[165]

Whilst, for example, the corporations law referral is justifiable on the bases of ensuring economic and legal consistency and efficiency, it is part of an aggregation of powers in the Commonwealth. Over-reliance on the referral power as opposed to the utilisation of other methods of ensuring consistency has meant that the referral power has morphed into an informal method of amendment to the *Constitution*. Even though Robert French is a proponent of the use of referrals in the name of cooperative federalism, he stated it best himself when he noted that cooperative federalism leads towards centralisation in the Commonwealth:[166]

'[f]or every topic which is treated as national becomes, potentially, a matter which somewhere along the line, it can be argued, is best dealt with by a national government.'

Indeed, French argued that it would be quite difficult to reverse matters which had led to a transferral of responsibility into the hands of the Commonwealth owing to the political costs of doing so.[167]

The following case studies highlight the cumulative effect of referrals in centralising power in recent decades. On one hand, the aforementioned corporations law referral had economic and legal benefits attached to it. However, its effect when combined with the anti-terrorism law referral shortly after, which involved the coercive functions of the state, is part of an accumulation of power in the Commonwealth. The subsequent industrial relations referral also serves as evidence of the cumulative effect of centralisation – the corporations law referral provided control to the Commonwealth over a majority of employees in Australia.

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[164] Ibid 606.
[165] Ibid 626.
[166] French, 'The incredible shrinking federation' n (107) 63.
[167] Ibid.

C *Case Study A – Anti-terrorism law*

The referral by all State Parliaments to the Commonwealth regarding the ability to make laws dealing with terrorism in 2002–2003 constituted a significant transfer of power on a matter which relates to the coercive functions of the state. It also served to immediately build upon the corporations law referral, as part of the cumulative process in buttressing Commonwealth legislative power. Whilst this referral involved a matter of national concern, the existence of an alternative that is a truer manifestation of cooperative federalism, and is a more optimal alternative to deal with an issue that has consequences for individual liberties, represents an impermissible centralisation of power in the Commonwealth. Further, the quite broad nature of the ability to amend the referral legislation compounds these issues.

The enactment of the *Criminal Code Amendment (Terrorism) Act 2003* was empowered by the referral power, which inserted pt 5.3 into the *Criminal Code Act 1995* (Cth). The *Criminal Code Amendment (Terrorism) Act 2003* created offences, among other things, for committing a terrorist act and providing or receiving training connected with terrorist acts.

A fully integrated national scheme is not inappropriate in dealing with a matter of common concern across the Commonwealth. Such a referral is in the spirit of cooperative federalism, and terrorism, as recognised by the High Court's decision in *Thomas v Mowbray*, presents an internal threat to the Commonwealth 'inspired externally'.[168]

However, the alternative suggestion of Callinan J in *Thomas v Mowbray* is more effective in facilitating national coordination on such an important issue, whilst also ensuring that the States retain ultimate control in this area. Justice Callinan suggested that it would have been preferable for the States to have enacted their

[168] (2007) 233 CLR 307, 505 (Callinan J).

own anti-terrorism provisions as part of a coordinated, national agreement on the issue.[169] These State laws would be enforced by 'military forces and other federal agencies'.[170] The capacity of the Commonwealth to do so would be supported by s 51(vi) of the *Constitution*, as it would be deemed a matter with respect to the naval and military defence of the States.[171] This proposal would ensure that the referral of a matter so closely intertwined with the use of government coercive powers is not unduly centralised in the Commonwealth. This option is most reflective of cooperative federalism – it is a representation of States acting in concert with a shared purpose. In contrast to a referral on the matter, it has the benefit of allowing States to maintain legislative control over anti-terrorism powers. The suggestion of Callinan J is one which is constitutionally sound, and is cautious in ensuring that the referral power is not used unnecessarily.

In addition, at the time of the referral, no prior referral had granted the Commonwealth such extensive police powers.[172] Such an expansion was a significant departure from the standard method of referring matters in the civil realm of the law, such as family and corporations law. The significance of this referral is also evidenced by the fact that law and order has typically been an issue that preoccupies State politics. For the States to have transferred responsibility for law-making on certain aspects of terrorism is not a shift to be disregarded as a transient moment. To the contrary, it is a marked vacation of a matter which is of traditional importance within State politics.

There are also issues associated with the limitations placed on future amendments to the referral. Amendments to pt 5.3 of the *Criminal Code Act 1995* (Cth) introduced by the Commonwealth in the *Anti-Terrorism Act (No 2) 2005* (Cth) sought to give the courts the ability to make control orders. However, referral

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[169] Ibid 511.
[170] Ibid.
[171] Ibid.
[172] See generally 'Notes', *Parliament of Australia* (Web Page, 31 May 2013) <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution/Notes>.

legislation by the States had only permitted direct amendment of the Commonwealth legislation and not an amendment which would have substantive effect otherwise than as part of the text of the legislation.[173]

In determining the validity of the impugned legislation in *Thomas v Mowbray*, Kirby J held that the amendment did not fall under this definition as it operated as an 'addition',[174] whilst Hayne J held that it was permissible on the basis that 'express amendment' only involved a requirement to amend the text of the legislation.[175] As such, under Hayne J's analysis amendments can introduce new matters as long as they amend the text of the legislation, and fall within the description of a law with respect to the matter referred.[176]

It must also be noted that in limiting amendments to being an 'express amendment', s 100.8(2) of the *Criminal Code* (Cth) provided that such a change to the legislation could be made where a majority of States and Territories, and at least four States, agreed. Justice Callinan deemed that it 'could well be erroneous' to construe the referral power as supporting the provision on the basis that it could permit the future exercise of power by each State to be limited by the Commonwealth Parliament subject to an agreement between States and Territories contrary to the wishes of an individual State.[177] Justice Kirby was also concerned with the impact of such a provision on the will of State Parliaments to consent to amendments. His Honour expressed disapproval of the reliance placed on 'communiqués by heads of government alone'.[178]

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[173] *Terrorism (Commonwealth Powers) Act 2002* (NSW) s 3; *Terrorism (Commonwealth Powers) Act 2003* (Vic) s 3; *Terrorism (Commonwealth Powers) Act 2002* (Qld) s 3; *Terrorism (Commonwealth Powers) Act 2002* (SA) s 3; *Terrorism (Commonwealth Powers) Act 2002* (WA) s 3; *Terrorism (Commonwealth Powers) Act 2002* (Tas) s 4.
[174] *Thomas v Mowbray* (2007) 233 CLR 307, 379.
[175] Ibid 462.
[176] Ibid.
[177] Ibid 509–510.
[178] Ibid 383.

D *Case Study B – Industrial Relations Law*

The 2009 industrial relations referral by the State Parliaments, with the exception of Western Australia, was the result of the cumulative effect of the referral power. The referral related to the *Fair Work Act 2009* (Cth) ('*FWA*'), the successor to the *WorkChoices* scheme of industrial regulation implemented by the Howard Government. That scheme was in effect a national one which relied upon the corporations power in order to legislate with respect to industrial relations for constitutional corporations. The decision of the High Court in *New South Wales v Commonwealth* upheld the validity of this legislation.[179] As such, the scheme's application of the corporations power under s 51(xx) of the *Constitution* to deal with constitutional corporations necessarily meant the ability to regulate the conditions of employees in those corporations. However, the national scheme did not cover all employees owing to the uncertain nature of the corporations power. Each State thus enacted referral legislation to extend Commonwealth coverage over employees in industrial relations.

The snowball effect of an over-reliance on the referral power is particularly evidenced by this referral. The very broad corporations referral, which permitted the Howard Government to legislate with respect to corporations and create a national industrial relations scheme, covered 78 per cent of non-managerial private sector employees in Australia.[180] This left it as almost inevitable that the Commonwealth would seek to cover the remaining workers to the greatest extent it could.

Whatever the economic and legal merits of the referral, these are outweighed by its effect as another layer added to the breadth of Commonwealth power. The rapid use of the power to implement national schemes of regulation, with a cumulative effect necessitating further referrals, is one which was not envisaged by the

[179] (2006) 229 CLR 1.
[180] Explanatory Memorandum, Fair Work Amendment (State Referrals and Other Measures) Bill 2009 v.

framers of the *Constitution* when they emphasised its role in dealing with matters of regional concern between a few States.

Professor George Williams' speculation in his inquiry into the merits of a national industrial system that '[o]nce a State industrial system is gone, it may be incapable of being restored',[181] points to the difficulty for States' in clawing back power which they have, at least notionally, temporarily ceded. Notwithstanding the termination clauses which are in each referral legislation,[182] the fact that it may be entirely impracticable for State industrial relations schemes to ever be re-established after the referral ceases means the referral is practically indefinite.

The referral also enacted limitation provisions on the ability of the Commonwealth to amend legislation predicated on a referral.[183] These were in similar terms as those limitations placed on the anti-terrorism referral, with future amendments to be by 'express amendment' which cannot be the substantive amendment of the text of a provision.[184] The criticisms advanced above with respect to Hayne J's interpretation of 'express amendment' equally apply to this, as does the support for Kirby J's reasoning.

Further, like the corporations law referral, there is an intergovernmental agreement which governs the ability to make future amendments to the Commonwealth legislation.[185] Namely, the agreement provides that there must be a two-thirds majority of the States and Territories voting in favour of amendments proposed by

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[181] George Williams, *Working Together: Inquiry into Options for a New National Industrial Relations System: Final Report* (Report, 2007) 48.
[182] *Industrial Relations (Commonwealth Powers) Act 2009* (NSW) s 7; *Industrial Relations (Commonwealth Powers) Act 2009* (Vic) s 6; *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld) s 7; *Industrial Relations (Commonwealth Powers) Act 2009* (Tas) s 7; *Fair Work (Commonwealth Powers)* (SA) s 7.
[183] *Industrial Relations (Commonwealth Powers) Act 2009* (NSW) s 3; *Industrial Relations (Commonwealth Powers) Act 2009* (Vic) s 3; *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld) s 3; *Industrial Relations (Commonwealth Powers) Act 2009* (Tas) s 3; *Fair Work (Commonwealth Powers)* (SA) s 3.
[184] Ibid.
[185] Workplace Relations Ministerial Council, Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector, 11 December 2009 cls 2.4, 2.11–2.20.

the Commonwealth that are raised by one or more members of the Workplace Relations Ministers' Council – Referring States and the Territories Subcommittee as undermining basic workplace rights and principles, such as providing for a 'strong, simple and enforceable safety net of minimum employment standards'.[186] Lynch has noted that the tying of the approval mechanism to the FWA 'is a sign of the sacrifices required by intergovernmental cooperation' given that the FWA's validity is largely not reliant on State referrals.[187] The ability for States to regulate an aspect of legislation subject to their referral ought be characterised as a positive step to ensure cooperation thrives between levels of government, rather than a sacrifice – to do so is to frame the issue solely from the perspective of the Commonwealth.

V CONCLUSION

The referral power in s 51(xxxvii) of the *Constitution* has been increasingly utilised by Commonwealth and State governments to create national legislation. Whilst individual referrals may be argued as being in accordance with the cooperative face of federalism, the cumulative effect of centralisation flowing from an overuse of the power in recent decades demonstrates a concerning trend. The placitum's connection to cooperative federalism is on particularly shaky ground, given the cessation of a State's role in administering the legislative scheme the subject of a referral. Flowing from the lack of responsibility by States when the referral power is used is a diminution in political accountability – a key tenet of our federal system.

As illustrated by Australia's response to the COVID-19 pandemic, federalism is a dynamic system of government which contains the necessary tools to allow governments to respond to issues affecting the local communities to which they are closest and most accountable. The importance of localised decision-making,

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[186] Ibid cls 1.2, 2.18.
[187] Andrew Lynch, 'The Fair Work Act and the Referrals Power - Keeping the States in the Game' (2011) 24(1) *Australian Journal of Labour Law* 1, 19.

which allowed States throughout the recent pandemic to implement bespoke policies according to the capacity of their health systems and particular needs of essential industries, cannot be overstated. Whilst there has not been a single national response, the minimisation of case numbers and deaths has been for the benefit of the nation.

Going forward, the Australian polity must be careful to ensure that the referral power is used as a power of last resort. This article appeals to all levels of government to engage with the referral power in a restrained manner to ensure that decision-making resides at the most local level possible, and that the placitum is only relied upon when other modes of tangible cooperation are unworkable.