REFERRING LEGISLATIVE MATTERS TO THE COMMONWEALTH: FOUR COMMON DRAFTING ISSUES

JOHN LEDDA*

The current Commonwealth statute book is replete with legislation that relies on the Commonwealth's legislative power under s 51(xxxvii) of the Constitution *to make laws with respect to matters referred to the Commonwealth Parliament by Australian state parliaments. This article examines uncertainties concerning the scope of the power by focusing on four drafting issues that legislative drafters have commonly needed to consider when preparing legislation for schemes that rely on the power. It is argued that these uncertainties are either overstated or can be addressed using appropriate drafting techniques. Consequently, the power offers a constitutionally sound cooperative mechanism that allows the Commonwealth and the states to legislate for issues of national concern when they individually have insufficient legislative power to do so.*

CONTENTS

* LLB, LLM (Syd). Former Deputy Parliamentary Counsel, New South Wales Parliamentary Counsel's Office. Unless otherwise specifically indicated, the views expressed in this article are my personal views and should not be taken to reflect the views of the Commonwealth or any state or territory, their respective legislative drafting offices or the Australasian Parliamentary Counsel's Committee. I thank Chief Justice Lucy McCallum of the Supreme Court of the Australian Capital Territory for kindly reviewing earlier versions of this article. I also thank the referees and editors who were burdened with reviewing and editing this article for their suggestions. All errors, at least those in this article, are mine.

I Introduction

The Commonwealth of Australia is a polity whose legislative powers are limited to those enumerated in the *Constitution*.[1] However, the legislative powers of Australia's states are plenary rather than limited to specific subject matters.[2] The High Court has read Commonwealth legislative powers very broadly ever since its decision in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*.[3] Even so, the Commonwealth is sometimes prevented from enacting

[1] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 83 (Dixon J); *Australian Constitution* pt V.

[2] *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). See also *Australia Act 1986* (Cth) ss 2, 5; *Australia Act 1986* (UK) ss 2, 5.

[3] (1920) 28 CLR 129, 144, 153–4 (Knox CJ, Isaacs, Rich and Starke JJ).

comprehensive legislation to deal with issues of national concern because the subject matters specifically enumerated for it in the *Constitution* are insufficient. The states are similarly limited in their ability to individually enact comprehensive legislation to deal with these issues because they transcend state borders.[4]

These limitations on legislative power have resulted in the Commonwealth and the states implementing cooperative legislative schemes. The use of one type of scheme has become increasingly prevalent in recent years.[5] This type of scheme — a 'referral scheme' — relies on the legislative power conferred on the Commonwealth Parliament by s 51(xxxvii) of the *Constitution* (the 'referred matters power').[6]

The referred matters power allows the Commonwealth Parliament to make laws 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'.[7] The power is engaged in two ways:

1 By a state parliament referring a matter to the Commonwealth Parliament for legislation (a 'matter referral'); or

2 By a state parliament adopting a Commonwealth law based on a matter previously referred by another state parliament (a 'Commonwealth law adoption').[8]

The scope of the referred matters power in connection with the creation of referral schemes is too large a topic for a single article. Accordingly, the focus of this article is more limited. It examines uncertainties concerning the scope of the power by focusing on four drafting issues that legislative drafters (including, formerly, the author of this article) have commonly needed to consider when preparing legislation for referral schemes.

[4] See, eg, Graeme AR Johnson, 'The Reference Power in the Australian Constitution' (1973) 9(1) *Melbourne University Law Review* 42, 48–9.

[5] See Nicolas Moses, 'Re-Evaluating the Role of the Referral Power in Australian Federalism: A Tool of Last Resort' (2023) 50(1) *University of Western Australia Law Review* 1, 7–8.

[6] For a discussion of the different approaches to, and the taxonomies used for, cooperative legislative schemes, see generally Guzyal Hill, 'Referred, Applied and Mirror Legislation as Primary Structures of National Uniform Legislation' (2019) 31(1) *Bond Law Review* 81.

[7] *Australian Constitution* s 51(xxxvii).

[8] See Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 813.

Those issues are:

1 How to confine a matter referral to prevent Commonwealth overreach;

2 How to avoid state laws being rendered inoperative for inconsistency with a Commonwealth law based on a matter referral;

3 How to start and end a matter referral; and

4 Whether to enact a Commonwealth law adoption instead of a matter referral.

A referral scheme usually involves legislation enacted by all, or almost all, states.[9] However, for the sake of economy, the examples used in this article to illustrate these four drafting issues are limited to the legislation of two states. Examples from New South Wales ('NSW') are used to illustrate matter referrals because that State is often the lead jurisdiction for referrals.[10] Examples from Western Australia ('WA') are used to illustrate Commonwealth law adoptions because that State often enacts adoptions.[11] When considering these examples, it is important to appreciate that state legislation for referral schemes is usually based on agreed model provisions prepared or sanctioned by the Australasian Parliamentary Counsel's Committee ('PCC') for the purpose of implementing intergovernmental agreements.[12] The use of model provisions ensures that all

[9] The referral scheme for proceeds of crime (sometimes called 'unexplained wealth') is a rare example of a referral scheme involving only the Commonwealth and two states: see *Proceeds of Crime Act 2002* (Cth) pt 1.4 div 2, which relied on a matter referral given by s 4 of the *Unexplained Wealth (Commonwealth Powers) Act 2018* (NSW) ('*NSW Unexplained Wealth Referral Act*') and was adopted by ss 4–6 of the *Unexplained Wealth (Commonwealth Powers) Act 2021* (SA). Before South Australia's adoption of the scheme, New South Wales ('NSW') was the only participating jurisdiction: see Natalie Skead et al, 'Pocketing the Proceeds of Crime: A Case for Reform of Criminal Property Confiscation Legislation in New South Wales, Queensland and Western Australia' (2021) 45(1) *Criminal Law Journal* 46, 54.

[10] Moses (n 5) 8.

[11] See, eg, *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018* (WA) ('*WA Redress Scheme Adopting Act*'); *Personal Property Securities (Commonwealth Laws) Act 2011* (WA) ('*WA PPS Adopting Act*').

[12] The committee consists of the heads of the legislative drafting offices of the Commonwealth, each of the states, the Australian Capital Territory ('ACT'), the Northern Territory ('NT') and, for relevant projects, New Zealand: 'About Us', *Australasian Parliamentary Counsel's Committee* (Web Page) <https://pcc.gov.au/about.html>, archived at <https://perma.cc/QHQ3-A7CV>. For information about the committee and official versions of model provisions for some referral schemes, see 'National Uniform Legislation: Official Versions', *Australasian Parliamentary Counsel's Committee* (Web Page)

of the participating states in a referral scheme enact uniform matter referrals and Commonwealth law adoptions.

II Recent Proliferation of Referral Schemes

The current Commonwealth statute book is replete with legislation that relies, whether wholly or partly, on the referred matters power as a source of legislative power. Examples include Commonwealth legislation about each of the following:

- Business names;[13]
- Consumer credit;[14]
- Corporate regulation and financial services and markets;[15]
- Financial matters concerning de facto relationships;[16]
- Industrial relations;[17]
- Personal property securities;[18]
- Mutual recognition within Australia of certain occupations and standards for goods;[19]
- Terrorism;[20] and
- Water management in the Murray-Darling Basin.[21]

The proliferation of Commonwealth legislation supported by the referred matters power is a relatively recent phenomenon.[22] This proliferation is at least

<https://pcc.gov.au/uniform_legislation_official_versions.html>, archived at <https://perma.cc/TZ7L-95XL>.

13 See, eg, *Business Names Registration Act 2011* (Cth) div 3.

14 See, eg, *National Consumer Credit Protection Act 2009* (Cth) div 2.

15 See, eg, *Corporations Act 2001* (Cth) s 3; *Australian Securities and Investments Commission Act 2001* (Cth) div 3 ('*ASIC Act*').

16 See, eg, *Family Law Act 1975* (Cth), as amended by *Family Law Amendment Act 1987* (Cth), *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

17 See, eg, *Fair Work Act 2009* (Cth) pts 1–3.

18 See, eg, *Personal Property Securities Act 2009* (Cth) div 2 ('*Cth PPS Act*').

19 See, eg, *Mutual Recognition Act 1992* (Cth) s 3; *Trans-Tasman Mutual Recognition Act 1997* (Cth) s 3.

20 See, eg, *Criminal Code Act 1995* (Cth) s 100.3.

21 See, eg, *Water Act 2007* (Cth) s 9A.

22 Moses (n 5) 5–6.

partly explained by High Court decisions that thwarted a previous attempt at a cooperative legislative scheme concerning corporate regulation. That scheme involved each state and the Northern Territory ('NT') individually enacting legislation to apply the text of a law enacted by the Commonwealth for the Australian Capital Territory ('ACT').[23] A brief survey of the history of this scheme provides some important context for the four drafting issues considered by this article.

In 1989, the Commonwealth attempted to enact comprehensive legislation on the topic of corporate regulation by relying principally on its legislative power under s 51(xx) of the *Constitution*.[24] That power enables the Commonwealth Parliament to make laws with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.[25] However, in 1990 the High Court struck down provisions of the legislation that dealt with the incorporation of trading or financial corporations because they were not supported by s 51(xx).[26]

From 1991–2001, the Commonwealth, the states and the NT participated in a cooperative legislative scheme aimed at overcoming the limitations on the Commonwealth's legislative power concerning corporations.[27] This scheme involved the Commonwealth enacting legislation, limited in its application to the ACT, using the legislative power conferred on the Commonwealth Parliament by s 122 of the *Constitution* to make laws for the government of Commonwealth territories.[28] The substantive text regulating the incorporation and activities of corporations, called the 'Corporations Law', was then applied in the states and the NT by legislation enacted by each of those jurisdictions.[29]

[23] See below nn 27–8 and accompanying text.

[24] Explanatory Memorandum, Corporations Bill 1988 (Cth) 10 [17]. See generally *Corporations Act 1989* (Cth).

[25] *Australian Constitution* s 51(xx).

[26] *New South Wales v Commonwealth* (1990) 169 CLR 482, 503 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ).

[27] See *Corporations (New South Wales) Act 1990* (NSW) pt 2; *Corporations (Northern Territory) Act 1990* (NT) pt 2; *Corporations (Queensland) Act 1990* (Qld) pt 2; *Corporations (South Australia) Act 1990* (SA) pt 2; *Corporations (Tasmania) Act 1990* (Tas) pt 2; *Corporations (Victoria) Act 1990* (Vic) pt 2; *Corporations (Western Australia) Act 1990* (WA) pt 2. See also Governor, 'Corporations (New South Wales) Act 1990 No 83: Proclamation' in New South Wales, *New South Wales Government Gazette*, No 180, 24 December 1990, 11457, 11457.

[28] Part 2 of the *Corporations Act 1989* (Cth) applied the 'Corporations Law' set out in s 82 (and regulations made under that Act) to the ACT. The *Corporations Act 1989* (Cth) was later repealed by the *Corporations (Repeals, Consequentials and Transitionals) Act 2001* (Cth).

[29] See above n 27.

In 2000, the High Court in *R v Hughes* ('*Hughes*') cast doubt on the constitutional viability of this cooperative legislative scheme by holding that the Commonwealth could not, even with the consent of the Commonwealth Parliament, validly accept power conferred on its officers or instrumentalities (in *Hughes*, the Commonwealth Director of Public Prosecutions) by a state law that adversely affected the rights of individuals unless the Commonwealth had the legislative competence to confer those powers itself.[30] This decision, together with the High Court's decision in *Re Wakim; Ex parte McNally*, which denied states the power to confer state jurisdiction on federal courts, sounded the death knell for the scheme.[31]

To avoid the potential collapse of Australia's corporate regulatory regime, the Commonwealth, together with all of the states, quickly used the referred matters power to create a referral scheme (the 'corporations legislation referral scheme') to support the enactment of both the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth).[32] These Acts remain the mainstays of corporate regulation in Australia.[33] Also, as we will see, the state legislation for the scheme has provided a template for subsequent referral schemes.

[30] (2000) 202 CLR 535, 558 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Hughes*'). For an analysis of *Hughes* (n 30) and its implications, see generally Dennis Rose, 'The Hughes Case: The Reasoning, Uncertainties and Solutions' (2000) 29(2) *University of Western Australia Law Review* 180.

[31] (1999) 198 CLR 511, 551 [39] (McHugh J), 577 [113] (Gummow and Hayne JJ, Gleeson CJ agreeing at 540 [3], Gaudron J agreeing at 546 [26]), 625 [256] (Callinan J).

[32] See *Corporations (Commonwealth Powers) Act 2001* (NSW) s 4 ('*NSW Corporations Referral Act*'); *Corporations (Commonwealth Powers) Act 2001* (Qld) s 4; *Corporations (Commonwealth Powers) Act 2001* (SA) s 4; *Corporations (Commonwealth Powers) Act 2001* (Tas) s 5; *Corporations (Commonwealth Powers) Act 2001* (Vic) s 4; *Corporations (Commonwealth Powers) Act 2001* (WA) s 4. The Commonwealth relied on its power under s 122 of the *Constitution* to apply the *Corporations Act 2001* (Cth) and the *ASIC Act* (n 15) to the ACT and the NT: *Corporations Act 2001* (Cth) s 3(2)(a).

[33] See 'Key Documents in the History of Australian Corporate Law', *Melbourne Law School* (Web Page) <https://law.unimelb.edu.au/centres/mccl/research/research-programs/corporate-law-and-financial-regulation/resources/history/key-documents-in-the-history-of-australian-corporate-law>, archived at <https://perma.cc/V9PM-4KJS>.

III The First Issue: Confining a Matter Referral

A *The Legal Context*

Occasionally commentators writing on the referred matters power speak loosely of a referral of 'power' to the Commonwealth.[34] However, the referred matters power is not engaged by a state parliament referring a 'power' to the Commonwealth Parliament; it is engaged by a state parliament referring a 'matter'.[35] The chapeau to s 51 of the *Constitution* confers on the Commonwealth Parliament the 'power to make laws for the peace, order, and good government of the Commonwealth' with respect to matters that have been referred to it under s 51(xxxvii).[36]

The approach that is currently taken by state parliaments to confining matter referrals so as to prevent Commonwealth overreach can be traced to the decision of the High Court in *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* ('*Ex parte ANA*').[37]

In *Ex parte ANA*, the High Court held that a state parliament must express its will about the scope of a matter referral by enacting its will in a statute.[38] Such statutes are called 'state referral Acts' in this article. Specifically, the High Court held that the referred matters power should be applied without making implications or imposing limitations that are not found in its express words and should, because it is a constitutional provision, be construed with all the generality that its words admit.[39] The High Court also held that a matter referral can be expressed in terms of general subject matters because it would be 'absurd to

[34] See, eg, Robert S French, 'The Referral of State Powers' (2003) 31(1) *University of Western Australia Law Review* 19, 27; Hill (n 6) 92, citing John Wanna et al, *Common Cause: Strengthening Australia's Cooperative Federalism* (Final Report, May 2009) 20 <https://www.caf.gov.au/__data/assets/pdf_file/0010/976942/Common-Cause-Strengthening-Cooperative-Federalism.pdf>, archived at <https://perma.cc/MB95-JD4U>.

[35] Ross Anderson, 'Reference of Powers by the States to the Commonwealth' (1951) 2(1) *University of Western Australia Annual Law Review* 1, 6. See also *Sande v Registrar, Supreme Court (Qld)* (1996) 64 FCR 123, 130–1 (Lockhart J) ('*Sande*').

[36] *Graham v Paterson* (1950) 81 CLR 1, 21–2 (McTiernan J) ('*Graham*').

[37] (1964) 113 CLR 207 ('*Ex parte ANA*').

[38] Ibid 226 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

[39] Ibid 225 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

suppose that the only matter that could be referred was the conversion of a specific bill for a law into a law'.[40]

Following *Ex parte ANA*, there are two constitutionally permissible ways for a state referral Act to confine a matter referral:

1 By referring specific statutory provisions for enactment by the Commonwealth Parliament; or

2 By referring specified subject matters for Commonwealth legislation rather than specific statutory provisions for enactment.[41]

B *Combined Text and Amendment References*

State parliaments sometimes refer only a subject matter to the Commonwealth Parliament.[42] The more common approach is to refer both initial statutory provisions for enactment by the Commonwealth Parliament along with a subject matter that enables the Commonwealth Parliament to amend those provisions. The *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018* (NSW) ('*NSW Redress Scheme Referral Act*') provides a recent example of this combined approach.[43]

The *NSW Redress Scheme Referral Act* first refers '[m]atters to which the initial referred provisions relate'.[44] The 'initial referred provisions' are defined to mean the scheduled text to the extent that the scheduled text deals with matters included in the legislative powers of the Parliament of NSW.[45] The 'scheduled text' is in turn defined to mean the text of a proposed Bill for the

[40] Ibid. Section 2 of the *Commonwealth Powers (Air Transport) Act 1952* (Tas), which was considered in *Ex parte ANA* (n 37), provided that '[t]he matter of air transport is referred to the Parliament of the Commonwealth': see at 221 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

[41] *Sande* (n 35) 130 (Lockhart J), citing *Ex parte ANA* (n 37) 225 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

[42] See, eg, *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) s 4(1); *Commonwealth Powers (Family Law—Children) Act 1986* (NSW) s 3.

[43] See also *Industrial Relations (Commonwealth Powers) Act 2009* (NSW) s 5(1) ('*NSW Industrial Relations Referral Act*'); *Personal Property Securities (Commonwealth Powers) Act 2009* (NSW) ss 6(1)–(2) ('*NSW PPS Referral Act*').

[44] *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018* (NSW) s 4(1) ('*NSW Redress Scheme Referral Act*').

[45] Ibid s 3 (definition of 'initial referred provisions').

Commonwealth Act set out in sch 1 to the *NSW Redress Scheme Referral Act*.[46] Although the proposed Bill is set out in the *NSW Redress Scheme Referral Act*, state referral Acts commonly specify provisions for a proposed Bill using text that is tabled in a state parliament if the proposed Bill is too large to be included within a state referral Act.[47]

The referral of the matters to which initial referred provisions relate is expressed to be 'only to the extent of making laws with respect to those matters by including the initial referred provisions in a Commonwealth Act enacted in the terms, or substantially in the terms, set out in the scheduled text'.[48] The expression 'substantially in the terms' is intended to enable the Commonwealth Parliament to make minor adjustments to the scheduled text.[49]

The referral of the initial referred provisions is called the 'text reference' in the *NSW Redress Scheme Referral Act*.[50] It is also sometimes called the 'initial reference' in other state referral Acts.[51] This article uses the more descriptive term 'text reference' for this kind of matter referral.

The *NSW Redress Scheme Referral Act* then refers

> [m]atters relating to a redress scheme for institutional child sexual abuse … except as provided by sections 5 and 6 … but only to the extent of making laws with respect to those matters by making express amendments of the National Redress Act.[52]

The 'National Redress Act' is defined to mean a Commonwealth Act 'enacted in the terms, or substantially in the terms, of the scheduled text and as in force from time to time'.[53]

46 Ibid s 3 (definition of 'scheduled text').

47 See, eg, *Business Names (Commonwealth Powers) Act 2011* (NSW) ss 3 (definitions of 'tabled text', 'initial business names matters' and 'continuing business names matter'), 4, 5(1) ('*NSW Business Names Referral Act*'); *NSW Corporations Referral Act* (n 32) ss 3(1) (definitions of 'referred provisions' and 'tabled text'), 4(1)(a); *NSW PPS Referral Act* (n 43) ss 3 (definitions of 'initial referred provisions' and 'tabled text'), 4(1)(a).

48 *NSW Redress Scheme Referral Act* (n 44) s 4(1).

49 See Explanatory Note, Corporations (Commonwealth Powers) Bill 2001 (NSW) 7, which concerns the purpose of the expression 'substantially in the terms' as found in cl 4(1)(a) of the Corporations (Commonwealth Powers) Bill 2001 (NSW).

50 *NSW Redress Scheme Referral Act* (n 44) ss 3 (definition of 'text reference'), 4(1).

51 See, eg, *NSW Industrial Relations Referral Act* (n 43) ss 3(1) (definition of 'initial reference'), 5(1)(a); *NSW PPS Referral Act* (n 43) ss 3 (definition of 'reference'), 6(1).

52 *NSW Redress Scheme Referral Act* (n 44) s 4(2).

53 Ibid s 3 (definition of 'National Redress Act').

An express amendment of the 'National Redress Act' is defined to mean 'the direct amendment of the text of that Act (whether by the insertion, omission, repeal, substitution or relocation of words or matter) by another Commonwealth Act or by an instrument under a Commonwealth Act'; this definition expressly excludes 'the enactment by a Commonwealth Act of a provision that has or will have substantive effect otherwise than as part of the text of the National Redress Act'.[54] This definition is based on a common precedent in other recent state referral Acts.[55]

The referral of matters limited to the express amendment of the 'National Redress Act' is called the 'amendment reference' in the *NSW Redress Scheme Referral Act*.[56] Other state referral Acts use the same term.[57] This article also uses the term for this kind of matter referral.

C *Uncertainty concerning Combined References*

An uncertainty to do with the approach of combining text and amendment references is the extent of a state parliament's power to impose requirements or exclusions on the Commonwealth Parliament concerning the exercise of the referred matters power with respect to the references. This is because it is arguable that a state parliament may only confine the matters to be referred and not the Commonwealth's legislative power with respect to those matters.[58] The basis for this argument is that the legislative power with respect to a given referred matter is conferred by the chapeau to s 51 of the *Constitution* and not by a given state referral Act. The role of a state referral Act is limited to defining the extent of the subject matter for the exercise of this legislative power.

Two examples of requirements and exclusions commonly imposed by state referral Acts illustrate this uncertainty.

The first example concerns the requirement to include provisions in a particular Commonwealth Act if they are based on a text or amendment

[54] Ibid s 3 (definition of 'express amendment').

[55] The concept of 'express amendment' appears to have been first used in the *NSW Corporations Referral Act* (n 32) s 3(1) (definition of 'express amendment'). For another example, see *NSW PPS Referral Act* (n 43) s 3 (definition of 'express amendment').

[56] *NSW Redress Scheme Referral Act* (n 44) s 3 (definition of 'amendment reference').

[57] See, eg, *Water (Commonwealth Powers) Act 2008* (NSW) ss 3(1) (definition of 'amendment reference'), 4(1)(b); *NSW PPS Referral Act* (n 43) ss 3 (definition of 'amendment reference'), 6(2)–(4).

[58] P Buchanan, 'The Queen v Public Vehicles Licensing Appeal Tribunal of Tasmania; Ex parte Australian National Airways Ltd' (1965) 1(2) *Federal Law Review* 324, 326.

reference.[59] The practical benefit of that requirement is obvious. It helps referring states keep track of how the Commonwealth exercises its legislative power with respect to the references and also when it ceases to do so.

The second example concerns the exclusion of specified kinds of provisions from the making of laws based on an amendment reference. For instance, the matters referred by the amendment reference given by s 4(2) of the *NSW Redress Scheme Referral Act* are limited by the words 'except as provided by sections 5 and 6' (of that Act). Section 5(2) of the Act provides that the amendment reference does not include 'the matter of making a law to the extent that the law would operate to prevent or limit the power to establish, or to prevent or limit the operation of, any State redress mechanism'. Section 6 of the Act excludes from the reference the matter of making a law to the extent that the law would substantively remove or override a provision of the 'National Redress Act' that requires the agreement of NSW.

On one view, the requirement or exclusion involved in these examples is an attempt to limit the exercise of legislative power with respect to the matters to be referred rather than to confine the scope of those matters. The first example seems to be a direction by a state parliament for the Commonwealth Parliament to limit the exercise of its legislative power based on a text or amendment reference to a particular Commonwealth Act. The second example also seems to direct the Commonwealth Parliament not to exercise its legislative power so as to enact particular kinds of provisions.

The distinction between limiting a matter and limiting the legislative power with respect to a matter should not be applied formalistically. This would be inconsistent with the guidance of the High Court in *Ex parte ANA* to read the referred matters power with all the generality that its words admit.[60] Rather, the characterisation of a requirement or exclusion should focus on what is being done in substance rather than in form.

For the first example above, it is important to recall that the High Court in *Ex parte ANA* explicitly acknowledged that a matter referral may, but need not, be confined by referring a specific Bill for a Commonwealth statute to the Commonwealth Parliament for enactment.[61] Sometimes a text reference refers provisions for insertion into an existing Commonwealth statute rather than

[59] See, eg, *NSW Industrial Relations Referral Act* (n 43) s 5(1)(a); *NSW PPS Referral Act* (n 43) s 6(1).

[60] See *Ex parte ANA* (n 37) 225 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

[61] Ibid. See above n 59 and accompanying text.

referring a Bill for a new statute.[62] Similarly, an amendment reference confines the matters it refers to express amendments of an existing Commonwealth statute.[63] The referral of a Bill for a new Commonwealth statute necessarily operates to require that provisions are located in the resulting statute.[64] If it is constitutionally permissible to require the Commonwealth Parliament to enact a particular statute, there is no justification for denying a state parliament the power to require provisions to be included in a particular Commonwealth statute even if the text or amendment reference concerned does not refer the text of a Bill for a new statute. To permit one but not the other is to favour form over substance. A requirement concerning where provisions should be located does not diminish the substantive power of the Commonwealth Parliament to enact the provisions or regulate the matters covered by the text or amendment reference.

For the second example above, a state parliament could achieve the same result by using only a text reference that does not include the excluded kinds of provisions. As we have seen, the use of a text reference to confine a matter referral to specified provisions is constitutionally permissible.[65] There is no justification for denying a state parliament that gives both a text and amendment reference the alternative avenue of confining the amendment reference by excluding particular kinds of provisions. Again, to permit one but not the other is to favour form over substance. The exclusion of provisions from an amendment reference operates in substance to confine the matters covered by the reference just as the specification of provisions confines a text reference.

These examples can be contrasted with s 4 of the *Commonwealth Powers Act 1943* (NSW), which provided that

> no law made by the Parliament of the Commonwealth with respect to matters referred to it by this Act shall continue to have any force or effect, by virtue of

[62] See, eg, *NSW Industrial Relations Referral Act* (n 43) ss 3(1) (definition of 'initial referred provisions'), 5(1)(a), sch 1.

[63] In *Thomas v Mowbray* (2007) 233 CLR 307 ('*Thomas*'), Kirby J's reasoning presupposed that an amendment reference could be limited to express amendments of a Commonwealth Act because his Honour found that the amendments concerned did not fall within the definition of 'express amendment' in the relevant state referral Act: at 379–80 [203]–[207]. The reasoning of
Hayne J upholding the amendments also necessarily presupposed that such a limitation is constitutionally effective: see at 461–2 [452]–[455].

[64] See above Part III(B).

[65] See above n 41 and accompanying text.

> this Act or the reference made by this Act, after the expiration of [the period for the reference].

That section did not seek to confine the matters referred to a period: this would have been permissible.[66] Rather, the section purported to provide that the Commonwealth law ceased to be supported by the referred matters power once the period for the reference ended.[67]

D *Delegating Amendment Approval to the Executive*

Confining a matter referral using referred provisions or specified subject matters can be contrasted with a type of amendment reference that appears to have been used only once.

Section 4(1) of the *Mutual Recognition (New South Wales) Act 1992* (NSW) ('*NSW Mutual Recognition Referral Act*') confines its matter referrals to the matters to which the schedule to the Act relates but only to the extent of '(a) the enactment of an Act in the terms, or substantially in the terms, set out in the Schedule' and '(b) the amendment of that Act (other than the Schedules), but only in terms which are approved by the designated person for each of the then participating jurisdictions'. The schedule to that Act sets out the provisions of a proposed Bill for a Commonwealth Act.[68] The Act provides that the designated person is: for a given state, that state's Governor; for the ACT, the Chief Minister of the ACT; and for the NT, the Administrator of the NT.[69] Although not entirely free from doubt, the use of 'approve' in the past tense suggests that the relevant approval must be given before the amendments can be enacted.[70]

The approval of amendments by these designated persons is problematic having regard to the High Court holding in *Ex parte ANA* that a state parliament must express its will about the scope of a matter referral by statute.[71] There

[66] See below Part V(C).

[67] See *Commonwealth Powers Act 1943* (NSW) s 4.

[68] *Mutual Recognition (New South Wales) Act 1992* (NSW) sch 1 ('*NSW Mutual Recognition Referral Act*').

[69] Ibid s 4(3).

[70] Ibid s 4(1)(b).

[71] *Ex parte ANA* (n 37) 226 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ). See also *Thomas* (n 63) 382 [213], where Kirby J said that '[a]s the language of the *Constitution* makes clear, the reference power belongs to the Parliaments of the States and only to those Parliaments'.

are at least three reasons why it is difficult to reconcile the amendment approval process in the *NSW Mutual Recognition Referral Act* with this proposition.

First, the designated persons of the states are state executive officials.[72] As a result, their decisions concerning amendment approvals may not necessarily reflect the prevailing will of their state parliament at the time that the approval is given. In particular, the fact that there is no process included in the Act for a designated person's state parliament to disallow an approval may result in that approval reflecting the will of the state's executive rather than of its parliament. In addition, it would be difficult to say that an approval reflected the will of a parliament that originally enacted the matter referral. The enactment of the approval mechanism suggests that the Parliament of NSW had not formed a considered view about what kinds of amendments would be appropriate.

Secondly, there is no clear limit imposed by a state parliament on the kinds of amendments that can, or cannot, be approved on its behalf. It might be argued that the approval power is limited by the prefatory words in s 4(1) of the Act to the matter referral — these words limit the matter referral to 'matters to which the Schedule relates'.[73] This limit, if it is a limit, provides a very uncertain guide for the designated person concerning what kinds of amendments can, or cannot, be approved on behalf of that person's state parliament. The need for an approval mechanism itself suggests that these prefatory words were considered to be too imprecise to effectively limit the matters referred by the Act. The referral of specific subject matters by a state referral Act at least provides a textual guide, enacted by a state parliament itself, that operates to limit the scope of the matters referred by the Act even if those matters are expressed using broad language.

Thirdly, authorising a state executive official to approve amendments is not analogous to authorising such an official to terminate matter referrals. As we will see, the High Court has held that a state governor can be empowered by a state referral Act to terminate a matter referral that is for a period.[74] However, these two kinds of executive power are distinguishable. A power to terminate a matter referral is limited to ending a referral whose scope has previously been defined by the state parliament that conferred the power. A power to approve amendments is different because that power gives an official, instead of their

[72] *Constitution Act 1902* (NSW) pt 4; *Constitution of Queensland 2001* (Qld) pt 4; *Constitution Act 1934* (SA) pt 3; *Constitution Act 1934* (Tas) pt II; *Constitution Act 1975* (Vic) pt IV; *Constitution Acts Amendment Act 1899* (WA) pt II.

[73] *NSW Mutual Recognition Referral Act* (n 68) s 4(1).

[74] See below nn 117–18 and accompanying text.

state parliament, the power to define the precise scope of amendments that are covered by the referral.

It is interesting to note that the *NSW Mutual Recognition Referral Act* was amended in 2021 to refer additional matters to the Commonwealth Parliament concerning mutual recognition.[75] A fresh amendment reference was enacted for this purpose[76] along with an express statement that the operation of the existing text and amendment references are 'not affected' by the fresh amendment reference and vice versa.[77] The fresh amendment reference specifies subject matters for amendments rather than requiring the approval of amendments by designated persons.[78]

IV The Second Issue: Minimising State Law Inconsistency with Commonwealth Law

A *How Inconsistencies May Arise*

The legislative power conferred by the chapeau to s 51 of the *Constitution* is a power to make laws for the 'peace, order, and good government *of the Commonwealth*'.[79] Consequentially, a law based on a matter referral operates as a Commonwealth law for the purposes of the *Constitution* even though a state law referred the relevant matter.[80] Section 109 of the *Constitution* will therefore apply to resolve a conflict between a state law and a Commonwealth law based on a matter referral.[81]

Section 109 of the *Constitution* provides that when a state law is inconsistent with a Commonwealth law, the Commonwealth law prevails and the state law is invalid to the extent of the inconsistency. Although s 109 provides that an inconsistent state law is 'invalid', the High Court has read the section as

[75] See *NSW Mutual Recognition Referral Act* (n 68) s 5A, as inserted by *Mutual Recognition (New South Wales) Amendment Act 2021* (NSW) sch 1 item 3.

[76] *NSW Mutual Recognition Referral Act* (n 68) s 5A(1).

[77] Ibid s 5A(4).

[78] Ibid ss 5A(1)–(3).

[79] *Australian Constitution* s 51 (emphasis added).

[80] *Airlines of NSW Pty Ltd v New South Wales* (1964) 113 CLR 1, 38 (Taylor J, Kitto J agreeing at 30), 53 (Windeyer J) ('*Airlines of NSW*'). See also *Graham* (n 36) 19 (Latham CJ, Fullagar J agreeing at 26), 22 (McTiernan J), 25 (Williams J), 25 (Webb J).

[81] *Graham* (n 36) 19–20 (Latham CJ, Fullagar J agreeing at 26), 24 (Williams J), 25 (Webb J).

rendering an otherwise valid state law inoperative while the inconsistency persists, with the state law resuming its operation once the inconsistency ends.[82]

Section 109 of the *Constitution* is engaged not only when there is a direct inconsistency but also when a Commonwealth law evinces an intention to 'cover the field' of the law's subject matter and a state law intrudes into that field.[83] A Commonwealth law can include a statement that the law is not intended to cover the field (which is effective against an argument that the law covers the field), but such a statement will not prevent the application of s 109 to direct inconsistencies between provisions of the Commonwealth law and state law.[84]

When drafting state referral Acts, the potential application of s 109 can lead to uncertainty concerning the effect of that section on existing state laws if a Commonwealth law is enacted based on matter referrals given by the state referral Acts. It may not be feasible to confine a matter referral so as to remove this uncertainty. This is because the aim of most, if not all, matter referrals is to enable Commonwealth law to deal comprehensively with a subject matter where the states and the Commonwealth cannot do so individually.[85] But comprehensiveness often carries with it the danger that state laws might unintentionally be rendered inoperative by s 109 for inconsistency with Commonwealth law based on the referred matters power.

B *Statements about Concurrent Operation*

One technique used to address this danger is for a Commonwealth law based on a matter referral to include a statement that it is intended to operate concurrently with state law and not to cover the field.[86] As noted above, these kinds of statements do not prevent the application of s 109 to direct inconsistencies

[82] *Carter v Egg & Egg Pulp Marketing Board* (1942) 66 CLR 557, 573 (Latham CJ), 599 (Williams J, Rich J agreeing at 581) ('*Carter*'); *Butler v A-G (Vic)* (1961) 106 CLR 268, 274 (Fullagar J), 278 (Kitto J, Menzies J agreeing at 286), 282–3 (Taylor J, Menzies J agreeing at 286, Windeyer J agreeing at 286).

[83] *Ex parte McLean* (1930) 43 CLR 472, 483–4 (Dixon J); *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 489 (Isaacs J).

[84] *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545, 563–4 (Mason J, Barwick CJ agreeing at 552, Gibbs J agreeing at 552, Stephen J agreeing at 552, Jacobs J agreeing at 565).

[85] See above n 4 and accompanying text.

[86] See, eg, *Cth PPS Act* (n 18) ss 243, 254.

between a Commonwealth law and a state law.[87] A direct inconsistency may arise if it is not possible to obey both laws.[88] It may also arise if one law confers a right and the other law takes away or detracts from that right.[89]

C *Avoiding Direct Inconsistencies Using Winding Back Triggers*

A technique used to avoid unintended direct inconsistencies is to include provisions in the Commonwealth law that enable participating states or the Commonwealth to wind back the operation of the law when state laws are incapable of operating concurrently with it. The corporations legislation referral scheme provides a useful illustration of the technique.

Part 1.1A of the *Corporations Act 2001* (Cth) provides in s 5E that the legislation enacted under the corporations legislation referral scheme, defined in the Act as the 'Corporations legislation', is intended to operate concurrently with the laws of the states and territories.[90] Part 1.1A also includes the following provisions:

- Section 5F, which provides that the Corporations legislation does not apply to a matter in a state or territory if that matter is declared by a law of the state or territory to be an excluded matter for the purposes of s 5F (a 'matter' is defined to include an 'act, omission, body, person or thing');[91]
- Section 5G, which provides that the Corporations legislation does not apply so as to prevent an inconsistency with a specified provision of a law of a state or territory if a law of that state or territory declares that specified provision to be a Corporations legislation displacement provision for the purposes of s 5G;[92] and

[87] See above n 84 and accompanying text.

[88] See, eg, *R v Licensing Court of Brisbane; Ex parte Daniell* (1920) 28 CLR 23, where inconsistency arose when the relevant state law required a referendum to be held on a particular day and the relevant Commonwealth law prohibited referendums being held on that day: at 28–9 (Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ), 32 (Higgins J).

[89] See, eg, *Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 151, where a Commonwealth law permitted women to be employed in a particular industry and a state law made it an offence for an employer in that industry to employ women in that industry: at 160 (Latham CJ), 162 (Starke J), 164 (Williams J).

[90] *Corporations Act 2001* (Cth) s 9 (definition of 'Corporations legislation').

[91] Ibid s 5F(6) (definition of 'matter').

[92] Ibid ss 5G(3)(b) items 3, 5, 5G(11).

- Section 5I, which in sub-s (1) enables the Governor-General to make regulations that modify the operation of the Corporations legislation so that (a) provisions of the Corporations legislation do not apply to a matter dealt with by a specified state or territory law or (b) no inconsistency arises between the operation of a provision of the Corporations legislation and the operation of a specified provision of a state or territory law ('matter' is defined in the same way as s 5F).[93]

These additional provisions involve the Corporations legislation winding back its own operation by using different triggers. One trigger relies on Commonwealth regulations; the other two triggers rely on a state law making an appropriate declaration.

The winding back trigger that relies on Commonwealth regulations is an example of what is sometimes pejoratively called a Henry VIII clause, named after the English monarch because of his unfortunate tendency to rule by proclamation.[94] The High Court has described a Henry VIII clause as a provision of a statute that authorises the making of delegated legislation that may be inconsistent with or amend the statute.[95]

The winding back triggers that rely on state law declarations do not fall directly within this description because they may not necessarily be made using regulations or similar forms of delegated legislation. For example, declarations are often included in state statutes.[96] Nevertheless, these triggers, like Henry VIII clauses, involve an action by a body other than the Commonwealth Parliament that results in the winding back of a Commonwealth statute.

All of these triggers raise an important question: are they constitutionally permissible given that they empower a delegate of the Commonwealth Parliament to alter the operation of the Parliament's own legislation?

[93] Ibid s 5I(3) (definition of 'matter').

[94] The pejorative use of the term can be traced to the *Proclamation by the Crown Act 1539*, 31 Hen 8, c 8, also known as the *Statute of Proclamations*, which stated:

> [T]he Kinge for the tyme beinge with thadvice of his honorable Counsell … may set forth at all tymes … pclamacons, under suche penalties and paynes and of suche sorte as to his Highnes and his seid honorable Counsell … shall see necessarie and requisite; And that those same shalbe obeyed observed and kept as thoughe they were made by Acte of Parliament …

[95] *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1, 6 n 10 (French CJ, Crennan, Kiefel and Keane JJ).

[96] See, eg, *James Hardie (Civil Liability) Act 2005* (NSW) s 27(3); *Legal Profession Uniform Law 2014* (NSW) ss 108(5), 258(6); *AGL Corporate Conversion Act 2002* (NSW) ss 28(2), 31(5), 35(4), 41(2).

In *Victorian Stevedoring & General Contracting Co Ltd v Dignan* ('*Dignan's Case*'), the High Court upheld the validity of a provision in a Commonwealth Act that enabled Commonwealth regulations to be made with respect to the employment of transport workers 'notwithstanding anything in any other Act'.[97] In doing so, the High Court rejected the notion that there is a strict separation between Commonwealth legislative and executive powers under the *Constitution* that prevents the Commonwealth Parliament from conferring legislative power on a delegate.[98]

Nonetheless, the High Court in *Dignan's Case* held that the Commonwealth could not 'abdicate' its legislative power. As Evatt J explained:

> On final analysis therefore, the Parliament of the Commonwealth is not competent to 'abdicate' its powers of legislation. This is not because Parliament is bound to perform any or all of its legislative powers or functions, for it may elect not to do so; and not because the doctrine of separation of powers prevents Parliament from granting authority to other bodies to make laws or by-laws and thereby exercise legislative power, for it does so in almost every statute; but because each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject matters stated in the *Constitution*. A law by which Parliament gave all its law-making authority to another body would be bad merely because it would fail to pass the test last mentioned.[99]

In a similar vein, Dixon J observed that, despite the absence of a strict constitutional separation between legislative and executive power, '[t]here may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power'.[100]

The approach of the High Court in *Dignan's Case* has been criticised as being overly formalistic and ripe for restatement, particularly in its application to Henry VIII clauses.[101] Yet the approach remains the law. Indeed, Mason CJ, Dawson and McHugh JJ said in *Capital Duplicators Pty Ltd v Australian Capital*

[97] (1931) 46 CLR 73, 84 (Gavan Duffy CJ and Starke J), 101 (Dixon J, Rich J agreeing at 86–7), 124 (Evatt J).

[98] Ibid 83–4 (Gavan Duffy CJ and Starke J), 101 (Dixon J, Rich J agreeing at 86–7), 117 (Evatt J).

[99] Ibid 121.

[100] Ibid 101.

[101] See, eg, Gerald Ng, 'Slaying the Ghost of Henry VIII: A Reconsideration of the Limits upon the Delegation of Commonwealth Legislative Power' (2010) 38(2) *Federal Law Review* 205, 210–15.

Territory [No 1] that it would not be easy to make out a case of an abdication of Commonwealth legislative power '[s]o long as Parliament retains the power to repeal or amend the authority which it confers upon another body to make laws with respect to a head or heads of legislative power entrusted to the Parliament'.[102]

Applying the approach in *Dignan's Case* to the winding back provisions in pt 1.1A of the *Corporations Act 2001* (Cth), it is difficult to see why the provisions in that part could not be characterised as being with respect to a matter under the referred matters power. This is because these provisions were included in the initial referred provisions for the corporations legislation referral scheme.[103] There is no doubt that they formed, and were intended by the referring states to form, part of the matter referral for the scheme. Moreover, the amendment reference for the scheme is broad enough to enable the Commonwealth Parliament to repeal or amend the provisions.[104]

V The Third Issue: Starting and Ending a Matter Referral

A *An Ongoing Debate*

There has been a debate that has happened over many years (extending back to the framers of the referred matters power) about the extent, if any, of a state's power to revoke or terminate a matter referral, particularly once the Commonwealth has enacted legislation based on the referral.[105]

[102] (1992) 177 CLR 248, 265.

[103] The Corporations Bill 2001 (Cth), which made up part of the tabled text referred to the Commonwealth Parliament by the *NSW Corporations Referral Act* (n 32), included the winding back provisions: see Corporations Bill 2001 (Cth) cls 5F, 5G, 5I. See also *NSW Corporations Referral Act* (n 32) ss 3(1) (definitions of 'referred provisions' and 'tabled text'), 4(1)(a).

[104] Section 4(1)(b) of the *NSW Corporations Referral Act* (n 32) refers the matters of the formation of corporations, corporate regulation and the regulation of financial products and services to the Commonwealth Parliament but only to the extent of the making of laws with respect to those matters by the making of express amendments to the Corporations legislation. Amendments made to pt 1.1A of the *Corporations Act 2001* (Cth), which would necessarily affect the extent to which the Corporations legislation applied in relation to those matters, would seem to fall within this amendment reference: see *NSW Corporations Referral Act* (n 32) s 4(1)(b).

[105] Johnson (n 4) 69–75. See also French (n 34) 25–7, citing *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 217 (Alfred Deakin), 218 (John Quick), 222–3 (Isaac Isaacs), 223 (Richard O'Connor); Andrew Lynch, 'After a Referral: The Amendment and Termination of Commonwealth Laws Relying on s 51(xxxvii)' (2010) 32(3) *Sydney Law Review* 363, 380–4.

In terms of realpolitik, it is unlikely that any state would be willing to refer legislative matters to the Commonwealth Parliament if the referral resulted in the state surrendering in perpetuity its legislative power with respect to the matter. Consequently, it is important when drafting state referral Acts to ensure that a matter referral can, if necessary, be brought to an end.

B *Starting a Matter Referral*

A logically anterior issue to whether it is possible to end a matter referral is determining when a referral starts. This issue is particularly important for the Commonwealth because of its relevance in deciding the appropriate timing for enacting Commonwealth legislation.

In considering when a referral starts, it is first important to understand the process for enacting state and Commonwealth statutes. This is because *Ex parte ANA* held that the will of a state parliament concerning a matter referral must be expressed by statute.[106] The Commonwealth Parliament also exercises the referred matters power by enacting statutes.

A state or Commonwealth statute is enacted if the Bill for the statute is passed by both Houses of Parliament (or, in the case of the unicameral Parliament of Queensland, its Legislative Assembly) and the state Governor (or, for Commonwealth statutes, the Governor-General) gives Royal Assent (on behalf of the monarch) to the Bill as passed.[107] However, a statute only has practical legal operation once it commences.[108] Often a statute commences on assent, but sometimes a later day is specified by the statute itself or it is left to the state governor (or the Governor-General) to fix the date by proclamation. The use of a proclamation to commence a state referral Act is now commonplace as the timing for the completion of the legislative process for enacting the Act in each participating state is likely to differ.[109]

The PCC has indicated in its published protocol concerning the drafting of national uniform legislation that '[i]n recent times, the Commonwealth has

[106] *Ex parte ANA* (n 37) 226 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

[107] *Australian Constitution* s 1; *Constitution Act 1902* (NSW) ss 3 (definition of 'The Legislature'), 5; *Constitution Act 1867* (Qld) ss 1–2A; *Constitution Act 1934* (SA) ss 4–5; *Constitution Act 1934* (Tas) s 10; *Constitution Act 1975* (Vic) ss 15–16; *Constitution Act 1889* (WA) s 2.

[108] See, eg, *Acts Interpretation Act 1901* (Cth) ss 3–3A; *Interpretation Act 1987* (NSW) s 23; *Legislation Interpretation Act 2021* (SA) s 27; *Acts Interpretation Act 1931* (Tas) s 9; *Interpretation Act 1984* (WA) ss 20, 22.

[109] See, eg, *NSW Industrial Relations Referral Act* (n 43) s 2; *Terrorism (Commonwealth Powers) Act 2002* (NSW) s 2 ('*NSW Terrorism Referral Act*').

been prepared to introduce its legislation once at least one of the States has introduced its referral legislation (with passage being delayed until at least one State's referral legislation is passed)'.[110] The rationale for this approach is likely to be that referral schemes often need to be put into place expeditiously.[111] The corporations legislation referral scheme provides a prime example of the need for expedition.[112]

Although an uncommenced state statute is still a state law, the referred matters power does not mention state laws — rather, it mentions 'matters referred' by state parliaments.[113] The use of the past tense of 'refer' indicates that the referral of a matter must happen *before* the Commonwealth Parliament can make laws with respect to the relevant matter. As matter referrals must be given by statute, this suggests that a matter is not referred until the provisions of the state referral Act giving the referral have commenced.

Since a Commonwealth statute also does not become a law until the Bill for the statute receives Royal Assent, it is arguable that a Commonwealth statute based on a matter referral is constitutionally valid if the referral commenced at any time before assent is given to the Commonwealth statute.[114] This argument receives some textual support from reading the chapeau to s 51 of the *Constitution* (which confers the power to make laws on the Commonwealth Parliament) together with s 1 of the *Constitution* (which provides that the Commonwealth Parliament shall consist of 'the [monarch], a Senate, and a House of Representatives').

Nevertheless, the more conservative approach taken by the Commonwealth to the introduction and passage of Commonwealth legislation based on a matter referral is preferable. That approach, as noted above, requires at least one state referral Act to be passed before the relevant Commonwealth legislation is passed.[115] This is a prudent approach if for no other reason than

[110] Parliamentary Counsel's Committee, *Protocol on Drafting National Uniform Legislation* (Protocol, 21 February 2018) 4 [4.3].

[111] See Victoria, *Parliamentary Debates*, Legislative Assembly, 20 March 2001, 302–3 (Stephen Bracks, Premier).

[112] See above nn 32–3 and accompanying text.

[113] *Australian Constitution* s 51(xxxvii).

[114] See ibid ss 1, 58.

[115] See above n 110 and accompanying text.

that a state referral Act can sometimes be amended during its passage through Parliament.[116]

Also, the text of a state referral Act is not finally settled until the Bill for that Act is passed by both houses, or the only house, of that state's parliament. There would be real doubt as to whether Commonwealth legislation was properly enacted based on a matter referral if that legislation was passed in circumstances where the text of the Bill for the relevant state referral Act was amended after the passage of the Commonwealth legislation but before the state legislation received Royal Assent. In such a circumstance, there would be no consideration by the Commonwealth Parliament of the amendments to the state Bill. There would also be no parliamentary consideration about whether the Commonwealth Bill was supported by the matter referrals given by the resulting state referral Act.

C *Ending a Matter Referral*

The High Court has held that a matter referral can be given for a period.[117] The High Court has also held, in *Ex parte ANA*, that a state referral Act can provide for such a period to end on a day fixed by a proclamation of a state governor.[118]

Because of this clear authority, state referral Acts provide for a matter referral to begin on the day that the referral commences and end on the day proclaimed by the state governor for its termination.[119] The proclamation power is discretionary and is usually accompanied by a power to revoke a previous proclamation or to fix a later day by a new proclamation, provided that power is exercised before the then-prevailing termination day.[120] In some cases, a fixed

[116] A recent example is the Mutual Recognition (New South Wales) Amendment Bill 2021 (NSW), which was amended during its passage through the Parliament of NSW (although not in relation to the scope of the matter referral): New South Wales, *Parliamentary Debates*, Legislative Council, 10 June 2021, 5994–5 (Mark Buttigieg).

[117] *Airlines of NSW* (n 80) 38 (Taylor J, Kitto J agreeing at 30), 52 (Windeyer J). See also *Ex parte ANA* (n 37) 226 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

[118] *Ex parte ANA* (n 37) 226 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

[119] See, eg, *NSW Terrorism Referral Act* (n 109) ss 4(5), 5(1); *NSW Industrial Relations Referral Act* (n 43) ss 5(5), 7(1).

[120] See, eg, *NSW Terrorism Referral Act* (n 109) s 5; *NSW Industrial Relations Referral Act* (n 43) s 7.

period has been specified in a state referral Act for a matter referral with a power given to the state Governor to extend that period.[121]

The issue about which some uncertainty remains is whether a matter that is referred without specifying a fixed or terminable period may nevertheless be revoked by a state parliament.[122] A matter referral of this kind is called an 'indefinite matter referral' in this article.

Generally, a state parliament cannot renounce or abdicate its power to repeal or amend its own statutes.[123] In *Ex parte ANA*, the High Court noted that '[t]he will of a Parliament is expressed in a statute or Act of Parliament and it is the general conception of English law that what Parliament may enact it may repeal'.[124] As a matter referral needs to be given by statute, another statute would be required to revoke an indefinite matter referral by either repealing the referral or expressly stating that it is revoked. Accordingly, to say that a state parliament cannot revoke an indefinite matter referral is effectively to say that the parliament cannot repeal or amend its own statute.

If a state parliament cannot revoke an indefinite matter referral, it must be because it is permissible to read such a limitation on its legislative power into the referred matters power. But the High Court made it clear in *Ex parte ANA* that the referred matters power should be applied without making implications or imposing limitations not found in its express words.[125] There are several reasons for not reading this limitation into the referred matters power.

First, the expression 'matter referred … by the Parliament or Parliaments of any State or States' in the referred matters power is inapt language for implying a limitation on a state parliament's power to revoke a referral.

[121] See, eg, *NSW Corporations Referral Act* (n 32) s 6; *NSW Unexplained Wealth Referral Act* (n 9) s 11. Andrew Lynch has questioned whether a power to extend a referral is valid, although he concedes that it is less objectionable if a state parliament is capable of revoking the extended matter referral: Lynch (n 105) 371.

[122] Some judges have questioned, or left open the issue of, whether a state parliament has the power to revoke an indefinite matter referral: see, eg, *Graham* (n 36) 25 (Webb J); *Airlines of NSW* (n 80) 53 (Windeyer J); *Ex parte ANA* (n 37) 226 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ); *Sande* (n 35) 131 (Lockhart J).

[123] See, eg, *Gould v Brown* (1998) 193 CLR 346, 486 [287] (Kirby J), citing *Cobb & Co Ltd v Norman Eggert Kropp* [1967] 1 AC 141, 157 (Lord Morris for the Court). A complete renouncement or abdication of legislative power is to be distinguished from imposing permissible manner and form requirements for the exercise of legislative power: cf *Australia Act 1986* (Cth) s 6; *Australia Act 1986* (UK) s 6.

[124] *Ex parte ANA* (n 37) 226 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

[125] Ibid 225 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

This language may be contrasted with the language of s 111 of the *Constitution*, which provides that:

> The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

The referred matters power could have used the language of surrender, but it did not — indeed, without comparable language in the power, the better view is that a state parliament cannot bind its successors by purporting to give an irrevocable matter referral even if it wished to do so.[126]

Secondly, such a limitation is inconsistent with High Court authority. In *Ex parte ANA*, the High Court held that a state parliament can authorise a state executive official to end a matter referral using a terminable period referral.[127] It makes little sense to deny the same state parliament the power to revoke the referral when it fails to use that artifice. Also, the High Court held in *Graham v Paterson* ('*Graham*') that the Commonwealth Parliament has a concurrent, rather than exclusive, power with respect to a matter that has been referred.[128] A state parliament does not surrender legislative power with respect to a matter that it refers; it merely shares it with the Commonwealth while the referral remains in force (subject to the operation of s 109 of the *Constitution*).[129]

Another argument concerning whether a state can revoke an indefinite matter referral should be mentioned if only to dismiss it. That argument is that a state statute revoking a matter referral that supports a current Commonwealth

[126] It was suggested in *South Australia v Commonwealth* (1942) 65 CLR 373, 416 by Latham CJ that:

> A State Parliament could not bind itself or its successors not to legislate upon a particular subject matter, not even, I should think, by referring a matter to the Commonwealth Parliament under sec 51 (xxxvii) of the *Constitution* — but no decision upon that provision is called for in the present case.

See also *Graham* (n 36) 25 (Webb J); *Ex parte ANA* (n 37) 226 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

[127] *Ex parte ANA* (n 37) 226 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

[128] *Graham* (n 36) 19–20 (Latham CJ, Fullagar J agreeing at 26), 22 (McTiernan J), 24–5 (Williams J), 25 (Webb J).

[129] See Twomey (n 8) 811.

law would be rendered inoperative by s 109 of the *Constitution* on the grounds of inconsistency.[130]

With respect, it is wrong to apply s 109 to the revocation of matter referrals in the same way in which that section is applied to resolve conflicts between a state law and a Commonwealth law based on a legislative power other than the referred matters power.[131] The referred matters power, unlike almost all other Commonwealth legislative powers, requires the participation of the states, or a state, for its exercise.[132] The focus of s 109 is resolving conflicts between laws of a state and the Commonwealth concerning the regulation of a particular subject matter where both polities independently have the power to make laws with respect to that subject matter.[133] The enactment of a state referral Act, which is a necessary precondition for the referred matters power to be enlivened, facilitates the Commonwealth's entry into a field that it would otherwise have insufficient legislative power to enter — this is not a case of both the Commonwealth and the state independently having legislative power to regulate the same field. To adapt the metaphor used by Fullagar J in *Australian Communist Party v Commonwealth*, applying s 109 to prevent the revocation of a matter referral would permit the stream to rise higher than its source.[134]

D *Can the Commonwealth Law Continue after a Referral Ends?*

An additional area of uncertainty is whether a Commonwealth law based on a matter referral can have any continuing operation once the referral ends.[135] Although the end of a matter referral does not operate to repeal a Commonwealth

130 See, eg, W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Law Book, 5th ed, 1976) 171.

131 See Johnson (n 4) 69–70. See also Lynch (n 105) 382.

132 The other example of a legislative power requiring state participation is s 51(xxxviii) of the *Constitution*, which enables the Commonwealth Parliament to make laws with respect to

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

133 See *Carter* (n 82) 573 (Latham CJ).

134 (1951) 83 CLR 1, 258.

135 See, eg, French (n 34) 33, in which it is asserted (without the provision of reasons) that '[a]bsent any other provisions, it would be expected that [the Commonwealth law] would continue in force for there is nothing in the grant of the power which makes the laws under it self-terminating upon revocation of the referral'. This assertion has been criticised for having a lack of basis (whether textual or otherwise): see Lynch (n 105) 385.

law based on the referral, it has been suggested that '[the Commonwealth law], however, would cease to be operative, or valid, because the essential basis for its validity had gone'.[136] This suggestion pays insufficient attention to the language of the referred matters power.

1 *Mandatory Language of Referred Matters Power*

The referred matters power uses mandatory language: 'but so that the [Commonwealth] law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law'.[137] This mandatory language suggests that the power itself dictates when the Commonwealth law concerned applies to a state. In particular, the language suggests the following:

- As the Commonwealth law can only apply to states that refer the matter or adopt the law, it follows that the law ceases to 'extend' to a state if the state ends its referral or adoption; and
- If only one of several states ends its referral, the Commonwealth law can continue to 'extend' to the remaining referring or adopting states because their referrals and adoptions continue in force.

The mandatory language in the power also suggests that it would be beyond the legislative competence of both the Commonwealth Parliament and a state parliament to enact a law providing for the Commonwealth law to apply, or not to apply, to a state in a way that is inconsistent with the power's mandatory language.

2 *The Previous and Future Operation of Commonwealth Law*

With this language in mind, it is useful to consider the effect of the end of a matter referral on a Commonwealth law by first distinguishing between the law's 'previous operation' and its 'future operation'.

The 'previous operation' of the Commonwealth law is concerned with the rights, privileges, obligations or liabilities that arose under the law before the day on which the matter referral ended. The 'future operation' of the Commonwealth law is concerned with any rights, privileges, obligations or liabilities that would otherwise have arisen under the law on or after that day.

A Commonwealth law based on a matter referral that ends in a state can have no future operation in that state. The mandatory language of the referred

[136] Anderson (n 35) 8.

[137] *Australian Constitution* s 51(xxxvii).

matters power limits the application of the Commonwealth law to states where the matter 'is referred'.[138] Once the referral ends, the constitutional underpinning for the continuing creation in the state of rights, privileges, obligations or liabilities under the law has been lost.[139]

3 *Uncertainty about Effect on Previous Operation of Commonwealth Law*

The effect of the end of a matter referral on the previous operation of a Commonwealth law is less certain because its previous operation usually takes two different forms.

First, the previous operation of a Commonwealth law includes the rights, privileges, obligations or liabilities arising under that law that have been completely or fully exercised, complied with or enforced before the relevant matter referral ended. There is therefore no more work for that Commonwealth law to do in the future. In this article, this operation is called a law's 'completed previous operation'.

Secondly, the previous operation of a Commonwealth law also includes any rights, privileges, obligations or liabilities arising under that law before the relevant matter referral ended but which had not by that time been completely or fully exercised, complied with or enforced. That Commonwealth law would need to continue to have effect for the complete or full realisation of those rights, privileges, obligations or liabilities. For example, the prosecution of a person for an offence committed against a Commonwealth law before the matter referral ended may require the continued operation of an enforcement regime for offences set out in that Commonwealth law. In this article, this operation is called the law's 'uncompleted previous operation'.

4 *State Transitional Provisions*

Recent state referral Acts have sought to address the uncertainty mentioned above concerning the previous operation of a Commonwealth law based on combined text and amendment references by enacting state transitional provisions dealing with what happens if the amendment reference is terminated before the text reference is terminated.

[138] Ibid.

[139] Anderson (n 35) 8.

These state transitional provisions, as typically enacted, provide that the termination of the amendment reference does not affect:

1 Commonwealth laws that were made under the amendment reference before the termination (whether or not they have come into operation before the termination); or

2 The continued operation in the relevant state of Commonwealth laws as in operation immediately before that termination or as subsequently amended or affected by the Commonwealth laws made as mentioned in (1).[140]

Such state transitional provisions also provide that the amendment reference continues to have effect for these limited purposes, despite its termination, unless the text reference is also terminated.[141] Older referral schemes such as the corporations legislation referral scheme do not include these state transitional provisions.[142]

Such state transitional provisions do not distinguish between completed and uncompleted previous operations of the Commonwealth law. Nonetheless, they seem broad enough to encompass both. The continuation of an amendment reference to support the continued operation of a Commonwealth law with respect to its previous operation avoids the argument that the continued operation of provisions affected by amendments is not supported by a matter referral. However, such an amendment reference only continues in force *unless the text reference is terminated*.[143] Accordingly, state transitional provisions will not provide *any* support in a matter referral for the previous operation of a Commonwealth law if the relevant text reference is terminated.

5 *Continued Operation without Transitional Provisions*

What happens, in the event of a termination of a referral, if a state referral Act does not continue a matter referral in force to support the previous operation of a Commonwealth law?

An answer is more easily provided in relation to the completed previous operation than in relation to the uncompleted previous operation of a

[140] See, eg, *NSW Redress Scheme Referral Act* (n 44) s 8(1); *NSW PPS Referral Act* (n 43) s 8(1); *NSW Industrial Relations Referral Act* (n 43) s 8(1).

[141] See, eg, *NSW Redress Scheme Referral Act* (n 44) s 8(2); *NSW PPS Referral Act* (n 43) s 8(2); *NSW Industrial Relations Referral Act* (n 43) s 8(2).

[142] See generally *NSW Corporations Referral Act* (n 32); *NSW Mutual Recognition Referral Act* (n 68).

[143] See above n 141 and accompanying text.

Commonwealth law. As Deane J explained in *University of Wollongong v Metwally*, if a provision of an organic law such as the *Constitution* is framed so as to act on a particular reality, a subordinate law made by a parliament cannot retrospectively deny the existence of that reality if that reality truly existed.[144]

The referred matters power is framed to act on a particular reality:

1 A matter referral engaged the power; and

2 A Commonwealth law based on the referral extended to a state while that state's parliament referred the relevant matter.

The completed previous operation of this Commonwealth law would have been supported by the referral for the entire period of its operation and, as a result, the law would always have extended to the referring state during this period. A Commonwealth or state law, which is subordinate to the *Constitution*, cannot operate to alter this constitutional reality retrospectively.[145] A Commonwealth or state law that operated to deny that the Commonwealth law extended to a given state during that period would be inconsistent with the mandatory language of the referred matters powers concerning when the Commonwealth law extended to that state.[146]

An answer about the effect of the end of a matter referral on the uncompleted previous operation of a Commonwealth law is less easily provided. This is because the continued operation of a Commonwealth law will be needed for the rights, privileges, obligations or liabilities concerned to be completely or fully exercised, complied with or enforced.

Providing an answer is also complicated because Commonwealth laws that are based on matter referrals include provisions concerning their application to referring or adopting states. The *Business Names Registration Act 2011* (Cth) ('*Cth Business Names Act*') provides examples of these kinds of provisions.

Section 10 of the *Cth Business Names Act* limits the application of that Act and the *Business Names Registration (Transitional and Consequential*

144 (1984) 158 CLR 447, 478.

145 This argument is not inconsistent with *R v Corbett* [2004] 1 Qd R 146 ('*Corbett*'). In that case, the Queensland Court of Appeal held that a provision of the *Corporations Act 2001* (Cth) could validly extend to acts occurring before the matter referral for the Act commenced: *Corbett* (n 145) 160–1 [30]–[31] (Davies JA, Williams JA agreeing at 161 [33], Jerrard JA agreeing at 161 [34]). However, the Court held that the provision was distinguishable from a provision that purported to create or assert the facts necessary to engage the legislative power used to enact the provision (which would be invalid): at 159 [21] (Davies JA, Williams JA agreeing at 161 [33], Jerrard JA agreeing at 161 [34]).

146 See above n 137 and accompanying text.

Provisions) Act 2011 (Cth) (together, the 'National Business Names Legislation') to the geographical areas of the referring or adopting states. Section 8(5) of the *Cth Business Names Act* provides that a state ceases to be a referring or adopting state if the state terminates (as the case requires) its text reference or its adoption of the initial versions of the National Business Names Legislation. Section 8(6) of the *Cth Business Names Act* provides that, subject to certain conditions, a state also ceases to be a referring or adopting state if its amendment reference is terminated. This is despite the fact that the state referral Acts for the National Business Names Legislation scheme contain provisions continuing the effect of the amendment reference to support the previous operation of the National Business Names Legislation.[147] Accordingly, the *Cth Business Names Act* would itself prevent the continued application of the National Business Names Legislation to the uncompleted previous operation of the legislation in a state that terminates its matter referrals.

The approach taken in the *Cth Business Names Act* can be contrasted with the approach taken in the *Personal Property Securities Act 2009* (Cth) ('*Cth PPS Act*'). The *Cth PPS Act* seeks to apply its provisions to 'non-referring states' by relying on various Commonwealth legislative powers apart from the referred matters power.[148] This approach relies on a patchwork of legislative powers, so it would not necessarily save the entirety of the previous operation of the Act for states that became non-referring states due to ending their matter referrals.

6 *A Better Approach: Enacting Commonwealth Transitional Provisions*

It would be a better approach for future referral schemes to address the uncertainty concerning the end of matter referrals directly by enacting appropriate Commonwealth transitional provisions. These Commonwealth transitional provisions could be modelled on s 7 of the *Acts Interpretation Act 1901* (Cth). That section, which has counterparts in all state and territory interpretation statutes, preserves both the completed and uncompleted previous operation of

147 *NSW Business Names Referral Act* (n 47) s 9(3); *Business Names (Commonwealth Powers) Act 2011* (Qld) s 9(2); *Business Names (Commonwealth Powers) Act 2012* (SA) s 9(3); *Business Names (Commonwealth Powers) Act 2011* (Tas) s 9(3); *Business Names (Commonwealth Powers) Act 2011* (Vic) s 9(2); *Business Names (Commonwealth Powers) Act 2012* (WA) s 9(3)(a) ('*WA Business Names Adopting Act*').

148 *Cth PPS Act* (n 18) pt 7.3 div 2. See especially at s 243(2).

a repealed Commonwealth law.[149] Ideally, the transitional provisions would be supported by a limited transitional matter referral despite the principal matter referrals having ended. This would remove any doubt about whether the provisions were supported by a Commonwealth legislative power.

Even if the Commonwealth transitional provisions were not supported by a limited transitional matter referral, the express incidental power in s 51(xxxix) of the *Constitution* would probably support the provisions — the express incidental power enables the Commonwealth Parliament to, among other things, make laws with respect to 'matters incidental to the execution of any power vested by this *Constitution* in the Parliament or in either House thereof'.

The express incidental power is different from the implied incidental power. The implied incidental power, which is said to inhere in each legislative power conferred on the Commonwealth Parliament, is a power to legislate in relation to matters that are incidental or ancillary to the subject matter of a legislative power if they are necessary to effectuate the main purpose of that power.[150] It has been recognised that the implied incidental power is concerned with matters incidental to the *subject matter* of a specific Commonwealth legislative power while the express incidental power is concerned with matters incidental to *the exercise* of legislative power.[151]

It is arguable that the implied incidental power cannot be relied upon to support Commonwealth transitional provisions for a matter referral that has ended because the subject matter of that referral has gone. Nonetheless, as the express incidental power applies to exercises of legislative power, it is arguable that transitional provisions could be supported by that power because those provisions deal with a previous exercise of legislative power vested in the Commonwealth Parliament by a matter referral. Provisions are 'incidental' for the purposes of the express incidental power if they deal with 'something which attends or arises in [the exercise of the legislative power]'.[152] Nevertheless, it has

[149] *Legislation Act 2001* (ACT) s 84; *Interpretation Act 1987* (NSW) s 30; *Interpretation Act 1978* (NT) s 12; *Acts Interpretation Act 1954* (Qld) s 20; *Legislation Interpretation Act 2021* (SA) s 32; *Acts Interpretation Act 1931* (Tas) s 16; *Interpretation of Legislation Act 1984* (Vic) s 14; *Interpretation Act 1984* (WA) s 37.

[150] *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77 (Dixon CJ, McTiernan, Webb and Kitto JJ).

[151] *Le Mesurier v Connor* (1929) 42 CLR 481, 497–8 (Knox CJ, Rich and Dixon JJ) ('*Le Mesurier*'), cited in Garry A Rumble, 'Section 51(xxxix) of the Constitution and the Federal Distribution of Power' (1982) 13(2) *Federal Law Review* 182, 183.

[152] *Le Mesurier* (n 151) 497 (Knox CJ, Rich and Dixon JJ), cited in *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227, 236 (Gibbs CJ).

been said that provisions enacted on the basis of either the implied or express incidental power must be reasonably and appropriately adapted to the pursuit of an end within the main legislative power.[153] Commonwealth transitional provisions, which are aimed at facilitating the orderly winding up of the operation of a Commonwealth law based on a matter referral, would seem to satisfy both of these tests.

Commonwealth transitional provisions that are supported by the express incidental power would not be inconsistent, in the relevant sense, with the mandatory language of the referred matters power. This is because these provisions ensure the effective continuation of the Commonwealth law for the limited purposes of saving the completed previous operation of the law and enabling its uncompleted operation to be completed. These provisions are entirely tethered to the rights, privileges, obligations or liabilities that arose when matter referrals undoubtedly supported their creation, exercise or enforcement. These provisions affirm, rather than deny, that the Commonwealth law extended to the state while the matter referrals were in force.

Nevertheless, the most constitutionally secure support for Commonwealth transitional provisions remains a limited transitional matter referral.

VI The Fourth Issue: Enacting a Commonwealth Law Adoption Instead of a Matter Referral

A *The Question of Timing*

There are at least two reasons why a state may prefer to enact a Commonwealth law adoption instead of a matter referral. One reason is that the state may not be able to meet the timetable for enacting the matter referral. The other reason is that the state may wish to take a 'wait and see' approach concerning the practical operation of a referral scheme in other states.

The question of timing is often a significant issue when it comes to Commonwealth law adoptions. Consideration of that question is necessitated by the very language of the referred matters power.

[153] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 29–30 (Mason CJ) ('*Nationwide News*'), discussing *Davis v Commonwealth* (1988) 164 CLR 79. See also *Nationwide News* (n 153) 93–4 (Gaudron J), 101–5 (McHugh J). But see at 87–9 (Dawson J).

B *A Power Subject to a Qualification*

The referred matters power confers a power to make laws with respect to a matter referral subject to an express qualification. That qualification is that 'the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law'.[154]

This qualification recognises that a Commonwealth law based on the referred matters power can extend to states if their parliaments 'afterwards adopt the law'.[155] The use of the expression 'afterwards adopt the law' suggests that the framers of the referred matters power considered it necessary to provide an alternative to deal with situations where a state parliament did not refer the relevant matter by the time that the Commonwealth law (on the subject matter of that putative referral) was enacted. Its use also suggests that the framers of the power did not think that a state parliament could refer a matter after the relevant Commonwealth law was enacted — otherwise, including the words 'afterwards adopt the law' would have been unnecessary.

Some commentators have asked whether a law adopted by a state parliament is a Commonwealth law or a state law.[156] With respect, it cannot be right to say that it is a state law. As former Chief Justice Robert French has noted, writing extra-curially:

> [I]t is difficult to see how the language of [s 51(xxxvii)] could contemplate a law [that relies on the referred matters power] somehow changing its character from federal to State depending upon whether it applied to a referring or an adopting State.[157]

In the referred matters power, 'the law' that can be 'afterwards' adopted picks up the language used in the chapeau to s 51 of the *Constitution*, namely 'laws for the peace, order, and good government *of the Commonwealth*'.[158] The adopted law is necessarily a Commonwealth law.

[154] *Australian Constitution* s 51(xxxvii).

[155] Ibid.

[156] See James A Thomson, 'Adopting Commonwealth Laws: Section 51(xxxvii) of the Australian Constitution' (1993) 4(3) *Public Law Review* 153, 156, citing Ross Anderson, 'The States and Relations with the Commonwealth' in Justice Else-Mitchell (ed), *Essays on the Australian Constitution* (Law Book, 2nd ed, 1961) 93, 93, 112–13, PH Lane, *Lane's Commentary on the Australian Constitution* (Law Book, 1986) 276–7, 571–88, Leslie Zines, *The High Court and the Constitution* (Butterworths, 3rd ed, 1992) 330–3, Johnson (n 4) 69–75. See also French (n 34) 31.

[157] French (n 34) 31. See also Twomey (n 8) 812.

[158] Emphasis added.

C *The Drafting Approach for Commonwealth Law Adoptions*

It is useful to consider the approach taken to the drafting of state statutes that provide for Commonwealth law adoptions. These statutes are called 'state adopting Acts' in this article.

Contemporary state adopting Acts tend to adopt the version of the Commonwealth law as in force at the time of its adoption coupled with an amendment reference to enable the law to be subsequently amended in its application to the adopting state. The *Personal Property Securities (Commonwealth Laws) Act 2011* (WA) ('*WA PPS Adopting Act*') provides an example of this approach.

Section 6(1) of the *WA PPS Adopting Act* provides that the 'relevant version of the Commonwealth PPS Act is adopted within the meaning of [the referred matters power]'. The 'relevant version of the Commonwealth PPS Act' is defined in s 3 of the *WA PPS Adopting Act* to mean, in effect, the *Cth PPS Act* as originally enacted and as later amended by the *Personal Property Securities (Consequential Amendments) Act 2009* (Cth), the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth) and the *Personal Property Securities (Corporations and Other Amendments) Act 2011* (Cth). Significantly, this definition does not capture the *Cth PPS Act* as in force from time to time. Rather, it is limited to the version of the *Cth PPS Act*, as amended, up until the time of that Act's adoption.

Section 6(2) of the *WA PPS Adopting Act* provides that the adoption of the Commonwealth PPS Act has effect for a period commencing when s 6(1) of the *WA PPS Adopting Act* commences and 'ending at the end of the day fixed [by the Governor] under section 7 as the day on which the adoption is to terminate, but no longer'.

Section 8(1) of the *WA PPS Adopting Act* provides that the

> referred PPS matters in relation to personal property (other than fixtures and water rights) are referred to the Parliament of the Commonwealth on the day on which [s 8(1)] commences, but only to the extent of the making of laws with respect to those matters in relation to property of that kind by making express amendments of the Commonwealth PPS Act.[159]

The 'Commonwealth PPS Act' is defined in s 3 of the *WA PPS Adopting Act* to mean, in effect, the *Cth PPS Act* as in force from time to time.

[159] See also *WA PPS Adopting Act* (n 11) s 4(1) (definition of 'referred PPS matters').

This amendment reference mirrors the amendment reference given by the states that originally referred the text for the *Cth PPS Act*.[160] Section 8(6) of the *WA PPS Adopting Act* provides that the amendment reference has effect for a period commencing when the 'subsection under which the reference is made commences' and 'ending at the end of the day fixed [by the Governor] under section 9 as the day on which the reference is to terminate, but no longer'.

Section 10 makes it clear that it is the intention of the Parliament of WA that the Commonwealth PPS Act can be amended by the Commonwealth Parliament using its legislative powers both on account of, or apart from, a reference of any matters, or the adoption of the relevant version of the Commonwealth PPS Act, under the referred matters power.

There is an important difference to note between the amendment reference and the adoption in the *WA PPS Adopting Act*. Section 8(5)(a) of the Act expressly provides that a matter referred by the amendment reference in s 8(1) has effect only if, and to the extent that, the matter is not included in the legislative powers of the Commonwealth Parliament otherwise than by a reference for the purposes of the referred matters power. This means, in effect, that matters in s 8 are not effectively referred if the Commonwealth Parliament already has legislative power with respect to those matters. However, the adoption is not limited to the provisions of the relevant version of the Commonwealth PPS Act that rely exclusively on a matter referral for their enactment. Instead, under s 6(1) of the *WA PPS Adopting Act*, the whole of the 'relevant version of the Commonwealth PPS Act' as defined in s 3 of that Act is adopted.

D *What Needs To Be Adopted?*

The open-textured language of the qualification in the referred matters power creates some uncertainty about what needs to be adopted for the purposes of satisfying that qualification.[161] When considering this uncertainty, it is useful to distinguish between a 'principal law' and an 'amending law'. A 'principal law' is legislation that contains substantive legal provisions that are not limited to

[160] See *NSW PPS Referral Act* (n 43) ss 4, 6(2); *Personal Property Securities (Commonwealth Powers) Act 2009* (Qld) ss 4, 6(2); *Personal Property Securities (Commonwealth Powers) Act 2009* (SA) ss 4, 6(2); *Personal Property Securities (Commonwealth Powers) Act 2009* (Tas) ss 4, 8(2); *Personal Property Securities (Commonwealth Powers) Act 2009* (Vic) ss 4, 6(2).

[161] See above Part VI(B).

the repeal or amendment of legislation.[162] An 'amending law' is legislation that is limited to provisions that either repeal or amend legislation (or both).[163]

The approach of combining a Commonwealth law adoption with an amendment reference is typically used for an adoption of a Commonwealth law that is based on a text reference for a Bill for a new principal Commonwealth law.[164] The use of this approach may be explained by three inferences that can be drawn from the expression 'afterwards adopt the law' in the qualification in the referred matters power.[165]

First, the need for a state parliament to 'afterwards adopt' the Commonwealth law suggests that a state parliament, in the absence of an amendment reference, would need to adopt a Commonwealth law each time that law is amended because adoptions must occur after the relevant Commonwealth law provisions are enacted.[166] Combining an amendment reference with a Commonwealth law adoption avoids the need to adopt each new version of the Commonwealth law resulting from that law's amendment.

This can be contrasted with the approach taken by WA to amendments made in 2021 to the *Mutual Recognition Act 1992* (Cth). The State, which had previously adopted the entire Commonwealth Act, adopted only the amendments that had been made to the Act without disturbing the Act's previous adoption.[167] With respect, the adoption of only the amendments to a principal Commonwealth law is pointless. Textual amendments made to a principal law by an amending law do not have legal effect unless and until they commence and are incorporated into the text of the principal law. What requires adoption is not the amendments — it is the principal Commonwealth law as amended.

Secondly, the expression 'afterwards adopt the law' directs attention to 'the' law rather than 'a' law enacted by the Commonwealth Parliament based on a matter referral. The use of the definite article to identify what is capable of being adopted presupposes that a Commonwealth law will rely exclusively on a matter

[162] NSW Government, 'Types of NSW Acts', *NSW Legislation* (Web Page, 28 November 2023) <https://legislation.nsw.gov.au/information/types-of-nsw-acts>, archived at <https://perma.cc/ZL6Q-8MRQ>.

[163] Ibid.

[164] See, eg, *WA Business Names Adopting Act* (n 147) ss 5–6; *WA Redress Scheme Adopting Act* (n 11) ss 4–5.

[165] *Australian Constitution* s 51(xxxvii). On the difference between inferences and implications, see James Edelman, 'Implications' (2022) 96(11) *Australian Law Journal* 800, 801–2.

[166] Thomson (n 156) 156–7. See also Twomey (n 8) 813.

[167] See *Mutual Recognition (Western Australia) Act 2020* (WA) s 4(1A).

referral to support the enactment of all of its provisions. This may explain why state adopting Acts tend to adopt the whole of a principal Commonwealth law as in force at the date of its adoption.[168]

However, a Commonwealth law does not always rely exclusively on a matter referral for its enactment. For instance, as we have seen, the *Cth PPS Act* relies on legislative powers apart from the referred matters power to ensure that some of its provisions can apply to so-called 'non-referring states'.[169] The fact that a Commonwealth law does not expressly rely on alternative heads of legislative power does not mean that its provisions are unsupported by those powers. A Commonwealth law may be supported by more than one head of legislative power simultaneously.[170] In such cases, it is unnecessary to find the sole or dominant character of a Commonwealth law provided that there is a sufficient connection with at least one head of power to support the provisions concerned.[171]

It is also important to appreciate that the usual drafting practice for matter referrals is to provide for the referral of a matter to have effect if and to the extent that the Commonwealth Parliament does not otherwise have legislative power with respect to that matter.[172] The main object of matter referrals is to fill gaps in the Commonwealth's legislative powers rather than to support the enactment of a Commonwealth law in its entirety.

With this in mind, it is suggested that the adoption of a principal Commonwealth law could be limited to the adoption of provisions for which the Commonwealth Parliament does not have legislative power (apart from the matter referral). There is no need (and, arguably, no power) for an adopting state to adopt Commonwealth provisions that would apply to that state even without their adoption. Limiting an adoption in this way would be consistent with the

168 See above Part VI(C).

169 See above n 148 and accompanying text.

170 *Actors & Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 192 (Stephen J), 201–2 (Mason J, Aickin J agreeing at 215), 216 (Brennan J) ('*Actors & Announcers*'). See also *Victoria v Commonwealth* (1971) 122 CLR 353, 372–3 (Barwick CJ).

171 *Actors & Announcers* (n 170) 190–2 (Stephen J), 202 (Mason J, Aickin J agreeing at 215), 221–2 (Brennan J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 151 (Mason J), 270 (Deane J), cited in James Stellios, 'Constitutional Characterisation: Embedding Value Judgements about the Relationship between the Legislature and the Judiciary' (2021) 45(1) *Melbourne University Law Review* 277, 295. See also *Cunliffe v Commonwealth* (1994) 182 CLR 272, 334 (Deane J), 394 (McHugh J); *Leask v Commonwealth* (1996) 187 CLR 579, 621–2 (Gummow J), 633 (Kirby J).

172 See, eg, *NSW PPS Referral Act* (n 43) s 6(6)(a); *NSW Industrial Relations Referral Act* (n 43) s 5(2)(a).

language of the referred matters power, which limits adoptions to Commonwealth laws that are based on matter referrals given by other states.[173] It would also be consistent with the drafting practice mentioned above of providing for a matter to be referred only if and to the extent that the Commonwealth Parliament does not already have independent legislative power with respect to that matter.[174]

Even if this is the correct constitutional approach for Commonwealth law adoptions, state adopting Acts that purport to adopt the whole of a Commonwealth law without distinguishing between the sources of Commonwealth legislative power that support its provisions are likely to withstand constitutional challenge. This is because state interpretation statutes enable courts to read down provisions of state statutes that would otherwise be in excess of state legislative power.[175] A state adopting Act that adopted the whole of a Commonwealth law could be read down to adopt only the provisions that relied exclusively on the matter referral for their validity.

Thirdly, the requirement in the referred matters power for a state parliament to adopt 'the' law rather than 'a' law also suggests a limitation on the power of an adopting state to choose which provisions of a Commonwealth law based on a matter referral to adopt.

In *Graham*, Williams J said that

> [t]here is no reason to suppose that the framers of the *Constitution* ever intended that legislation of the Commonwealth Parliament with respect to matters referred to it by a State Parliament should have a different operation in that State to its operation in a State which afterwards adopts the law.[176]

In the absence of this limitation, a state parliament would be free to choose its own version of the Commonwealth law rather than the law that the Commonwealth Parliament had actually enacted based on a matter referral. This limitation would therefore prevent a state parliament from declining to adopt some of the provisions of a Commonwealth law based on a matter referral simply because it found them uncongenial. A state parliament must adopt either all of the provisions or none of them. This may be another reason why

[173] Twomey (n 8) 813.

[174] See above n 172 and accompanying text.

[175] See, eg, *Interpretation Act 1987* (NSW) s 31(1); *Acts Interpretation Act 1954* (Qld) s 9(1)(a); *Legislation Interpretation Act 2021* (SA) s 15(1); *Acts Interpretation Act 1931* (Tas) s 3; *Interpretation of Legislation Act 1984* (Vic) s 6(1); *Interpretation Act 1984* (WA) s 7.

[176] *Graham* (n 36) 24. See also Thomson (n 156) 157.

Commonwealth law adoptions tend to adopt the whole of a Commonwealth law as in force at the time of its adoption.

This limitation also has an important consequence for amendments to a principal Commonwealth law. A state adopting Act that adopts the version of a principal Commonwealth law that is fixed at the time of its adoption without providing an amendment reference would result in the adoption failing when the law is next amended in its application to referring states. This is because the amended principal law would have a different operation in the referring states than in the adopting state.

A possible drafting technique to avoid this result would be for a state adopting Act to adopt the principal Commonwealth law as in force from time to time. This anticipatory adoption of amendments could be expressed as being limited to the amendments supported by the amendment reference given by the referring states. However, such an approach is not free from doubt. In particular, can it be said that a state parliament has 'afterwards adopt[ed]' provisions that have not yet been enacted? The safer course for a Commonwealth law adoption remains the adoption of the relevant provisions of the principal Commonwealth law at the time of adoption coupled with an amendment reference that mirrors the reference given by referring states.

VII Conclusion

James Madison argued that the cause of liberty within a nation is best secured through the division of power between different governments, as well as between different branches of the same government, because doing so establishes a system of government with appropriate checks and balances.[177] But the division of power inherent in any federated nation means there are often issues of national concern that require cooperative action by the nation's different polities because each polity lacks sufficient legislative power to address those issues on its own.

It has been argued elsewhere that the referred matters power ought to be used for Australian cooperative legislative schemes only as a last resort principally because its use encourages unwelcome 'centralisation' in Australia's

[177] James Madison, 'The Federalist No 51: The Structure of the Government Must Furnish the Proper Checks and Balances between the Different Departments' in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed Ian Shapiro (Yale University Press, 2009) 263, 263–5.

federal system and a lack of state political accountability.[178] However, as we have seen, decisions of the High Court have imposed significant limitations on the capacity of cooperative legislative schemes that are grounded in state law to involve the Commonwealth and its courts and instrumentalities.[179] These limitations can only be overcome if a cooperative legislative scheme is grounded in Commonwealth law rather than state law.[180] Referral schemes provide this grounding.

This article has examined uncertainties concerning the scope of the referred matters power by focusing on four drafting issues that legislative drafters commonly need to consider when preparing legislation for schemes that rely on the power. It has been argued that these uncertainties are either overstated or can be addressed using appropriate drafting techniques. Consequently, the central thesis of this article is that the referred matters power offers a constitutionally sound cooperative mechanism to allow the Commonwealth and the states to legislate for issues of national concern when they individually have insufficient legislative power to do so.

[178] See, eg, Moses (n 5) 3–4.

[179] See above Part II.

[180] See above n 31.