REFERENCE OF POWERS BY THE STATES TO THE COMMONWEALTH

The history of the Commonwealth has been a history of continuous growth in the relative importance of federal institutions as against State institutions, a growth to which the two World Wars contributed a tremendous stimulus. Federal activities range over an ever-widening field, and in the financial sphere the Commonwealth has achieved a position of dominance over the States—facts which are reflected in the much greater interest displayed in federal politics than in State politics. In consequence it has become increasingly evident that the very limited nature of the powers conferred on the federal Parliament by the Constitution raises a serious obstacle to continued national progress. This has been recognised by leaders of all present-day federal political parties at one time or another—but unfortunately rarely at the same time in the same direction. The referendum under section 128 has proved to be an unsatisfactory instrument of constitutional amendment. Political parties cannot resist the temptation to make a referendum a trial of political strength, and the scales are heavily weighted in favour of the Noes. But the Constitution provides another method of enlarging federal powers in section 51 (xxxvii) by which the federal Parliament may make laws for the peace, order, and good government of the Commonwealth 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."

A number of abortive attempts have been made to confer additional powers on the Commonwealth by means of this provision.[1] On several occasions these even reached the stage of unanimous agreement by the State Premiers to refer powers to the Commonwealth, as in 1906 with regard to the hallmarking of jewellery, in 1915 with regard to various powers desired by the Commonwealth for the duration of the then war and for one year thereafter, in 1920 with regard to air navigation, and in 1942 again with regard to various powers for the duration of the war and for five years after the end of hostilities. In 1906 nothing further was done. In 1915 only New South Wales passed the necessary legislation. In 1920

[1] See the evidence of Sir R. R. Garran (then Solicitor-General of the Commonwealth), Higgins J., and Mr. L. F. East before the *Royal Commission on the Constitution 1927* (Minutes of Evidence), 74, 436-437, 455.

only Queensland and Tasmania passed Acts substantially in accordance with the terms of the Premiers' resolution; Victoria and South Australia passed Acts conferring much more limited power over air navigation; New South Wales and Western Australia failed to enact any legislation at all. In 1942 only New South Wales and Queensland passed Acts in accordance with the terms of the agreement; South Australia and Western Australia enacted modified versions, while Victoria made its Act conditional on all the other States enacting uniform legislation.

In 1920 the federal Parliament passed an *Air Navigation Act* which was to come into force on a day to be proclaimed. Owing to the failure of the States to take the necessary common legislative action this Act was never proclaimed. In 1947 the *Australian National Airlines Act 1945* was amended[1a] by the insertion of sec. 19A, which authorises the Australian National Airlines Commission to establish intra-State airline services in any State which had referred to the Commonwealth power over air transport, subject to the consent of the Premier of the State. Air transport was one of the matters referred to the Commonwealth by the (New South Wales) *Commonwealth Powers Act 1943* and the (Queensland) *Commonwealth Powers Act of 1943,* and in pursuance of sec. 19A the Commission established a number of airline services in New South Wales and Queensland.[1b] The only other occasion on which federal legislation was brought into operation in reliance on a reference of power by States was in 1949 when the federal government, by the *Liquid Fuel (Rationing) Act,* reintroduced petrol rationing after the previous regulations were held by the High Court to be invalid as an exercise of the defence power.[2] So far as New South Wales, Queensland, and Western Australia were concerned, the new regulations were to take effect by virtue of the *Commonwealth Powers Acts* passed in those States in 1943 referring to the federal Parliament power over, *inter alia,* the distribution of goods (New South Wales and Queensland) and the rationing of goods declared to be scarce by the federal Parliament (Western Australia). However, even in this case, the governments of those States deemed it necessary to introduce special legislation[3] to give the federal regu-

1a By *Australian National Airlines Act 1947,* sec. 5.

1b On the expiration of the (Queensland) *Commonwealth Powers Act of 1943* in 1950, five years after the end of hostilities, the reference of powers over air transport was continued in Queensland by the *Commonwealth Powers (Air Transport) Act of 1950.*

2 *Wagner v. Gall,* (1949) C.L.R. 43.

3 (New South Wales) *Liquid Fuel Act* 1949; (Queensland) *Liquid Fuel Act of 1949;* (Western Australia) *Liquid Fuel (Emergency Provisions) Act 1949.*

lations the force of *State laws* (as was done in Victoria and South Australia which had not referred the necessary power to the Commonwealth) for fear that hostile petrol interests might challenge the *Commonwealth Powers Acts* and in doing so obtain an injunction from the High Court restraining the Commonwealth from putting rationing into operation until the determination of the case.

This dismal history suggests that as a means of enlarging the legislative power of the Commonwealth, section 51 (xxxvii) offers even less hope than section 128. There is, however, a new factor in the constitutional relations of the Commonwealth and the States which may result in the future of section 51 (xxxvii) being less barren than its past: The position of overwhelming financial dominance acquired by the Commonwealth in consequence of the *Uniform Tax Case*.[4] The attempts made in the past to induce the States to refer powers to the Commonwealth were made on the basis of negotiation among seven roughly equal parties. The difficulty of securing common action on such a basis is obvious. But the *Uniform Tax Case* threw a new light on section 96[5] of the Constitution, revealing it as a powerful weapon in the hands of the Commonwealth with which to coerce recalcitrant States. The States are looking more and more to the Commonwealth for financial assistance. The federal Parliament is showing an increasing tendency to use the power given it by section 96 to attach conditions to grants of assistance to the States. The States can no longer regard themselves as equal political partners with the Commonwealth. It seems likely, therefore, that when the political atmosphere is favourable for further enlargement of federal powers, the Commonwealth will not find it so difficult as in the past to induce the States to refer the necessary powers. That being so, some examination of the legal difficulties involved in section 51 (xxxvii) is appropriate at this stage.

The main difficulties raised by the section are the following:—

(a) Can matters be referred to the federal Parliament in general terms?

(b) Is the legislative power over referred matters exclusive to the federal Parliament?

(c) Does a reference enable the federal Parliament to legislate unhampered by restrictions on *State* constitutional power derived from sources other than the federal Constitution?

[4] *South Australia v. Commonwealth*, (1942) 65 C.L.R. 373.

[5] "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."

(d) Is a reference, once made, irrevocable by the State?

I shall consider these questions in turn.

(a) Reference in general terms.

Sir E. F. Mitchell, K.C., was of the opinion[6] that section 51 (xxxvii) did not authorise the creation of a new subject-matter of federal legislation in general terms. He considered that it enabled the federal Parliament only to enact a law the complete terms of which had been agreed on by the States and then referred by legislation to the federal Parliament. The latter would thus have no discretion as to the precise nature of the legislation.

There does not seem to be any justification for interpreting the word "matters" in para. (xxxvii) in this narrow fashion, unless one starts from the assumption, as Sir E. F. Mitchell appeared to do, that the paragraph was not meant to provide a method of altering the Constitution alternative to section 128. There is nothing in section 128 or elsewhere in the Constitution to warrant such an assumption. It is at least as reasonable to assume that the inclusion of para. (xxxvii) was deliberately designed to provide a simple method of altering the Constitution by enlarging federal powers whenever such a course should be favoured by State governments, in order to avoid the trouble and expense of a referendum. The ordinary principles of interpretation of the Constitution, as laid down in the *Engineers' Case*,[7] require a broad construction of para. (xxxvii), so that a State Parliament may refer a matter to the federal Parliament in quite general terms, full discretion being left to that Parliament as to the way in which it may deal with the matter.

The historical genesis of para. (xxxvii) confirms this view. It is clearly derived from section 15 (i) of the *Federal Council of Australasia Act 1885*, under which the Federal Council had power to legislate with respect to matters referred by the legislatures of any two or more Colonies, such legislation to extend only to those Colonies by which the matter was referred or which afterwards adopted the law. In the case of this provision, however, the matters which might be referred to the Federal Council were stated—in general terms; e.g., general defence, quarantine.

(b) Non-exclusive character of reference.

The question whether the legislative power over referred matters is exclusive to the federal Parliament must now be answered in the

[6] *Royal Commission on the Constitution 1927* (Minutes of Evidence), 763-764.
[7] *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.*, (1920) 28 C.L.R. 129.

negative since the decision of the High Court in *Graham v. Paterson,*[8] where it was held that the reference to the federal Parliament by the Queensland *Commonwealth Powers Act of 1943,* sec. 2, of various matters including "profiteering and prices for goods and services" did not prevent the Queensland Parliament from legislating for the same matters by the *Profiteering Prevention Act of 1948.* That is to say, the power of the federal Parliament to make laws with respect to referred matters is concurrent with a continuing power in the States, a conclusion about which there could have been little doubt, since all the other powers conferred on the federal Parliament by section 51 are concurrent with State powers, except those which by their nature could not belong to the States.[9] State Parliaments, therefore, may continue to deal with matters which they have referred to the federal Parliament, subject to the operation of section 109 of the Constitution, i.e., if the federal Parliament chooses to exercise the power conferred on it, State laws will be superseded to the extent to which they are inconsistent with the federal laws.

(c) Operation of restrictions on State constitutional power.

State legislation is subject to certain restrictions which, since the *Statute of Westminster Adoption Act 1942,* do not apply to

[8] (1950) 81 C.L.R. 1.

[9] Section 51 (iv) Borrowing money on the public credit of the Commonwealth.
(x) Fisheries in Australian waters beyond territorial limits.
(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the Courts of the States.
(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States.
(xxix) External affairs.
(xxx) The relations of the Commonwealth with the islands of the Pacific.
(xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State.
(xxxiv) Railway construction and extension in any State with the consent of that State.
(xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise decides.
(xxxviii) 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 this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.
(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

federal legislation, namely, restrictions as to the extra-territorial operation of laws, and as to repugnancy to imperial legislation applying to the State. Can a State, by referring a matter to the federal Parliament, authorise the making of laws inconsistent with imperial legislation on that matter applying to the State, or having an extra-territorial operation which the State Parliament could not itself validly enact? It may be argued, on the analogy of the delegation of legislative power, that a State cannot confer on the federal Parliament any greater power than it has itself.

The analogy, however, is not an apt one. A reference under section 51 (xxxvii) is not a delegation of power from a superior to a subordinate body. In fact, as we have seen, it does empower the federal Parliament to make laws which in one respect have a superior efficacy to those of the State Parliament; by virtue of section 109 a federal law enacted pursuant to a reference will override even a *later* State Act inconsistent with it.[10] A State Parliament cannot confer such a power on any subordinate body. Para. (xxxvii) does not speak of the reference of *powers,* but merely of the reference of *matters.* The extent of the *power* to deal with a matter referred is therefore, it would seem, to be determined by reference not to the constitutional powers of the State parliament, but to the constitutional powers of the federal Parliament. As McTiernan J. put it in *Graham v. Paterson,*[11] "The *Commonwealth Powers Act* could not upon the terms of sec. 51 (xxxvii) cause any power to vest in the Commonwealth Parliament other than a power to make laws with respect to the referred matters for the peace, order, and good government of the Commonwealth. A power which is defined in these terms cannot be a State legislative power that has become vested in the Commonwealth. It is truly a Commonwealth power. It is subject to all the restrictions imposed by the Commonwealth Constitution upon the exercise of Commonwealth legislative power. It is a power concurrent with the power of the State itself to legislate with respect to the referred matters. It is not that power itself. Having regard to the terms of sec. 51 (xxxvii) and sec. 107, it could not be that power." Just as the power is subject to all the restrictions imposed by the federal Constitution on the exercise of federal legislative power, so it should not be regarded as subject to any other restrictions.

The actual wording of sections 2 and 3 of the *Statute of Westminster 1931* also suggests that the federal Parliament, in legislating

10 *Graham v. Paterson,* (1950) 81 C.L.R.1, at 19-20, 24.
11 *Ibid.,* at 22.

with respect to a referred matter, is not subject to the limitations on State Parliaments mentioned above. Section 2 provides that the *Colonial Laws Validity Act 1865* shall not apply to *any law* made by a Dominion Parliament, and that *no such law* is to be void on the ground that it is repugnant to any imperial law. Section 3 provides that a Dominion Parliament is to have *full power* to make laws having extra-territorial operation. Since Acts passed pursuant to a reference are laws made by the federal Parliament, those provisions of the *Statute of Westminster* should apply to them as much as to any other federal Act.

(d) Revocability of reference.

This is the question which has caused the greatest difficulty. Many authorities have expressed the opinion that once a matter has been referred to the federal Parliament by a State, it cannot be withdrawn by the State.[12] As a corollary to this proposition it is often said that a State cannot put a time limit on a reference.[13] In support of this view it is sometimes said[14] that once a matter is referred it becomes a fully-fledged addition to the subject-matters of federal legislative power contained in section 51 and the power of the federal Parliament to deal with it no longer needs the State reference to support it. This sounds very much like the argument that was advanced in *Graham v. Paterson,* in support of the exclusiveness of the federal power, based on the analogy of a transfer of property. Once the transfer is made, the property cannot be recalled at the mere will of the transferor. This analogy, however, was rejected by the High Court.[15]

A reference, as we have seen, may be made in general terms. No one would suppose, however, that it must be necessarily be in general terms. A State Parliament may delimit and define the "matter" which it wishes to refer. If it may delimit the nature and content of

12 For example, Sir R. R. Garran, *Royal Commission on the Constitution 1927* (Minutes of Evidence), 74; Sir E. F. Mitchell, *ibid.*, 766; H. S. Nicholas, *The Australian Constitution,* 275; Alfred Deakin, *Federal Convention Debates* (Melbourne, 1897), 217; and Wilbur Ham, K.C., in (1943) 16 A.L.J. 325-326. Mr. Wilbur Ham's opinion was one of a Collection of Opinions on the proposed *Commonwealth Powers Bill 1943* which was laid on the table of the Senate on 25 February, 1943. As these documents were not printed I have had no access to them, but they are the subject of a light-hearted article by "Senex"—*Commonwealth Powers Bill: A Repletion of Opinions,* (1943) 16 A.L.J. 332.

13 For example, Wilbur Ham, *loc. cit.;* W. K. Fullagar, K.C. (now Fullagar J. of the High Court), 16 A.L.J. 325; and the Hon. N. Keenan, K.C., in 111 *Parliamentary Debates* (Western Australia), 2184-2185.

14 By, *semble,* Wilbur Ham, *loc. cit.*

15 (1950) 81 C.L.R., at 18.

the "matter" in any way it pleases, may it not delimit the period of the reference? "Prices of goods for five years" is no less a "matter" which may be referred than "prices of goods"; but it is a different "matter." Contrary to the opinion expressed by Mr. Wilbur Ham, the true basis of the federal power to make laws with respect to referred matters would appear to be *and to remain* the reference by the State. The validity of any federal law under section 51 (xxxvii) must be determined primarily by the terms of the reference. If the reference was of a matter up to a certain date, a federal law dealing with the subject after that date is not a law with respect to the referred matter. The difficulty experienced by many authorities seems to have been in conceiving the federal Parliament to have a power at one time but to cease to have it at another. Such a conception should no longer be difficult since it is precisely what happens with the defence power. Numerous cases since the last war have demonstrated that the federal Parliament has power to do many things in the name of defence during a time of active hostilities which it has no power to do after hostilities have ceased.[16]

But the question whether a State can revoke a reference is a different matter from the question whether it can limit the period of a reference in advance. How, it is asked,[17] can a State Parliament repeal a federal law? This difficulty has led some authorities to suggest that a State may revoke its reference *before* the federal Parliament exercises its power by legislating on the referred matter, but not *after,* at any rate until the federal legislation expires or is repealed by the federal Parliament.[18] But the effect of a State Act repealing the Act by which the reference was made or otherwise revoking the reference would not be to *repeal* any federal Act passed pursuant to the the reference. The federal Act, however, would cease to be operative, or valid, because the essential basis for its validity had gone. The revocation of the reference does not *repeal* the Act any more than the cessation of hostilities and the return to peace-time conditions *repeals* war-time defence legislation. In both cases the continuing validity of the legislation depends on the continuance of a certain state of affairs—in the case of much defence legislation, on a continuing

16 See, for example, *Dawson v. Commonwealth,* (1946) 73 C.L.R. 157, *Crouch v. Commonwealth,* (1948) 77 C.L.R. 339, and *R. v. Foster,* (1949) 79 C.L.R. 43.

17 For example, by Sir R. R. Garran, *Royal Commission on the Constitution 1927* (Minutes of Evidence), 74; Sir E. F. Mitchell, *ibid.,* 766.

18 See W. A. Wynes, *Legislative and Executive Powers in Australia,* 162-163; J. H. Symon, *Federal Convention Debates* (Melbourne, 1897), 219; and I. A. Isaacs (afterwards Isaacs J. of the High Court), *ibid.,* 223.

danger of invasion or other hostile action; in the case of legislation pursuant to a reference, on a continuing reference by the State.

This, however, does not entirely dispose of the difficulty, because it remains to consider the effect of section 109. As we have seen, an Act passed by the federal Parliament under section 51 (xxxvii) is a "law of the Commonwealth" which by virtue of section 109 prevails over any State law inconsistent with it; opinions to this effect were expressed in *Graham v. Paterson.*[19] Is a State Act revoking the reference a law inconsistent with the federal Act in this sense? If so, then it must follow that the reference is irrevocable. But it may well be questioned whether section 109 is appropriate to such a situation. It is true that the legislative power conferred on the federal Parliament by all paragraphs of section 51 is "subject to this Constitution", but those words are words of limitation on the powers conferred. Section 109 is not a provision *limiting* federal power, but, on the contrary, a provision *extending* it. The terms of section 109 would not appear to be sufficient to preclude a State Parliament from exercising its constitutional power of repealing its own legislation. On the interpretation of section 51 (xxxvii) which has been put forward in this article, it would be competent to a State Parliament to insert in an Act referring a matter to the federal Parliament an express condition that the reference was to be subject to revocation at any time by Act of the State Parliament. Such a provision would simply mark out the matter referred in the same way as a reference for a definite period. If, then, an Act revoking a reference pursuant to such an express condition would not be invalid under section 109, there would seem to be no good reason why such a condition should not be implied in all cases, since it merely expresses an ordinary constitutional principle, so that section 109 would have no operation on any Act revoking a reference.

It must be observed that an Act of the State Parliament dealing with a matter which has been referred to the federal Parliament is not to be construed by reason of that fact alone as a revocation of the reference, either wholly or *pro tanto*. It is merely an exercise of the State's concurrent power, and as such falls within the true province of section 109. In *Graham v. Paterson*[20] it was argued that the Queensland *Profiteering Prevention Act of 1948* amounted to an

19 *Supra*, note 15. The High Court in this case deliberately refrained from discussing the question of the revocability of a reference since it was not necessary to the decision, but Webb J. (at 25) expressed the view that it was not irrevocable.

20 (1950) 81 C.L.R.1.

amendment of the *Commonwealth Powers Act of 1943* and was therefore invalid because it had not been passed in the manner and form laid down for amendments in the latter Act, namely, with the approval of a majority of the electors on a referendum. The Court, however, refused to regard the former Act as in any sense an amendment of the latter.[21] Whether a State Act dealing with a matter which has been referred to the federal Parliament is an amendment of the referring Act, so as to be outside the scope of section 109 but so as to repeal or amend the reference, is, of course, entirely a matter of the intention of Parliament, to be ascertained according to the ordinary principles of statutory interpretation.

Restrictions on revocation of references.

Finally, it is necessary to consider whether any restrictions can be placed on the power of a State Parliament to revoke a reference under section 51 (xxxvii), since if a State Parliament may revoke a reference at will, as would seem to be the conclusion reached so far, it may well be asked whether there is any real value in building further federal powers on such insecure foundations. There can be little doubt as to the answer in this case. The *Colonial Laws Validity Act 1865*, sec. 5, empowers State Parliaments to lay down a binding manner in which future laws respecting the constitution, powers, or procedure of the legislature must be passed.[22] Although it may not be entirely clear what laws are included in "laws respecting the powers" of the legislature,[23] there would seem to be no doubt that an Act referring a matter to the federal Parliament is such a law, and that therefore an Act revoking a reference is also such a law.[24] An Act of the latter kind would restore full competence to the State Parliament over a matter with respect to which it previously had competence only subject to the overriding power of the federal Parliament to deal with the matter.

It would therefore be possible to insert in a State referring Act a brake on hasty repeal or amendment by providing a special manner for the passage of such legislation; e.g., approval of the electors on a referendum, as was done in the *Commonwealth Powers Acts* of 1943 of New South Wales, Queensland, Victoria, and South Aust-

21 *Ibid*, at 17-18, 23.

22 *Attorney-General for New South Wales v. Trethowan*, [1932] A.C. 526.

23 *Cf.* Wynes, *Legislative and Executive Powers in Australia*, 362, with the decision of the High Court in *The South-Eastern Drainage Board (South Australia) v. The Savings Bank of South Australia*, (1939) 62 C.L.R. 603.

24 See *Taylor v. Attorney-General for Queensland*, (1917) 23 C.L.R. 457.

ralia; or approval by special majorities of the Houses of the State Parliament, as was done in the Western Australian *Commonwealth Powers Act,* 1943; or by other even more restrictive provisions. The Commonwealth could never be completely free from the possibility of a State withdrawing its reference, since it must be assumed that a State Parliament cannot abrogate its power entirely under section 5 of the *Colonial Laws Validity Act,* but by the methods suggested the power to legislate by reference from the States could be adequately safeguarded for most practical purposes.

ROSS ANDERSON*

* *M.A. (Oxon.), LL.B. (Western Australia); Rhodes Scholar, 1938; on military service, 1940-45; Research Scholar in Law, University of Western Australia, 1948; senior lecturer in Law, University of Queensland, 1949—.*