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**Industrial Relations:
The Referral of Powers**

by

Jason Arditi

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by

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SUMMARY

Constitutional Foundations: For most of the 20th century, Commonwealth industrial relations law was based on the conciliation and arbitration power of the Commonwealth Constitution (s 51(xxxv)). This head of power provides that the Commonwealth may make laws with respect to the:

Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

Historically, this power limited the Commonwealth's role in industrial relations legislation to establishing the machinery of dispute resolution and handling interstate disputes. **[2.1] – [2.2]**

In the 1990's, both the Keating and Howard Governments amended relevant industrial relations laws using different constitutional heads of power. The external affairs power (s 51(xxix)) was invoked to legislate on minimum wages, leave entitlements and anti-discrimination, while the corporations power (s 51(xx)) was invoked to legislate with respect to a corporation's ability to enter into enterprise bargaining agreements, both collectively and with individual employees. **[2.3]**

A major constitutional step-change occurred when, in 2005, the Howard Government's *Work Choices* legislation was founded primarily on the corporations power. By sidestepping the conciliation and arbitration power, the Commonwealth was announcing it could now make laws on industrial relations for constitutional corporations, unencumbered by previous limitations. The effect was to bring approximately 85% of workers within the remit of the Commonwealth industrial relations system. A subsequent High Court challenge – *NSW v Commonwealth* [2006] HCA 52 - confirmed that the Commonwealth could indeed rely on the corporations power when legislating on industrial relations matters. **[2.4]**

While the *Work Choices* legislation has since been replaced by the *Fair Work* reforms of the newly elected Rudd Government, the constitutional implications remain. An overwhelming majority of workers are still under the Commonwealth system with only public sector workers, as well as employees of partnerships and other unincorporated organisations spread across the remaining coverage of the States.

Referral Powers: The current situation has prompted suggestions that the States *refer* their remaining powers to the Commonwealth. Section 51(xxxvii) of the Commonwealth Constitution provides that:

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.

[3.1]

These can be either general powers, where a State (or States) gives the Commonwealth almost unlimited ability to legislate as it considers fit on a designated matter, or text-based, where a State (or States) proscribes the scope

and extent of the Commonwealth's ability to legislate on a matter that is being referred. [3.2]

As confirmed by the High Court, the States are able to make referrals for a specified period of time, or else insert termination clauses that take effect in certain circumstances. Similarly, the High Court has ruled that the referral power does not diminish the ability of a State (or States) to legislate concurrently with the Commonwealth, provided that the State does not enact legislation that is inconsistent with a relevant Commonwealth law.

While the High Court has ruled on some aspects of the referral power, others remain to be determined. This includes whether a general reference can be revoked and whether laws made pursuant to a reference remain valid after the reference expires. [3.3] – [3.6]

The Position of the States: Although all States have referred matters to the Commonwealth at some point in their history, such as the nationwide referral of corporate matters and terrorism related matters, to date, only Victoria has referred its industrial relations powers. [4.1] However, this situation may change as the Commonwealth is seeking to establish a national industrial relations system. [4.2] To this end, South Australia and Tasmania have both announced their intention to introduce referral legislation. At this stage Queensland has provided in-principle support for such a referral of power. On the other hand, Western Australia has indicated it does not intend to refer its industrial relations power. [4.3] The NSW position remains to be decided. Certain benefits of a national industrial relations system are acknowledged, while at the same time there is recognition of the advantages of particular features of the NSW system. A 2007 report by George Williams, commissioned by the NSW Government, canvassed the options available to NSW with respect to its industrial relations system, including the possibility of a referral of powers to the Commonwealth. [4.4]

Arguments in Favour and Against: The arguments on behalf of a State referring its industrial relations powers tend to focus on the merits of having uniform industrial relations law with a strong focus on the certainty, clarity and efficiency for businesses and workers that a uniform system would bring. In addition, proponents stress the inherent fairness in having just one industrial relations law. [5.1]

The contrary arguments tend to centre on the positive contribution competitive federalism has on policy creation, together with the negative constitutional implications for Australia's federal system of government. [5.2]

1 INTRODUCTION

Industrial relations laws have gone through a period of flux in the past few years. Up until 2005, the industrial relations systems of most States and the Commonwealth worked in tandem. Then, with the Howard Government's *Work Choices* changes, the balance of industrial relations power shifted decisively from the States to the Commonwealth.

Calls for the establishing of a national industrial relations scheme are of long standing. In 1996 Victoria referred much of its industrial relations powers to the Commonwealth. Following the passing of *Work Choices* and the subsequent *Fair Work* legislation of the Rudd Government, this debate has intensified, as have questions about the desirability and practicability of the States retaining their own industrial relations systems.

This briefing paper does not argue the case for or against the referral by NSW of its industrial relations power to the Commonwealth. Instead, it canvasses the debate about the issue and the mechanisms by which a referral of power might be achieved. The paper looks at industrial relations through a constitutional prism, by examining the various heads of power that have underpinned a succession of federal industrial relations legislation. The debate then widens to consider the Federal-State implications raised by a potential referral of industrial relations powers to the Commonwealth.

2 AUSTRALIAN CONSTITUTIONALISM

2.1 The Conciliation and Arbitration Power

Australia's federal system of Government is founded on a Constitution that distributes power between the Commonwealth and the States. The Constitution expressly authorises the Commonwealth to make laws with respect to the heads of power listed under section 51 of the Constitution.¹ Those matters that are not covered by section 51 are deemed residual matters, and are left to the States.

The heads of power listed under s 51 of the Australian Constitution cover a vast range of subject matters, ranging from trade to taxation, patents to pensions. An express power, general in scope, to make laws with respect to industrial relations is omitted from section 51 of the Constitution. The only specific industrial relations power, under section 51(xxxv), is the Commonwealth's ability to make laws with respect to the:

Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

By this power, the Commonwealth is limited to making laws with respect to

¹ George Williams, *The Constitution and a National Industrial Relations Regime*, Deakin Law Review Vol 10 No 2, 2005 at p 499.

industrial disputes that cross State boundaries, with the implication that wholly intrastate disputes are residual matters reserved for the States. The reason for this division was that:

By the time of Federation, all States had established conciliation and arbitration tribunals or wages boards to deal with industrial disputes. However, it was acknowledged at the Constitutional Conventions of the 1890s that the States were ill equipped to deal with interstate disputes, such as those that had occurred during the 1890s, and the Commonwealth should be able to establish machinery to deal with such matters.²

As such, the particular distribution of industrial relations responsibilities between the Commonwealth and the States was a response to the realities of the time. For the longer term, the result is that the Commonwealth is unable to develop a fully-fledged industrial relations system with nationwide application covering both the private and public sectors in all States.³ In the event, what emerged during the course of the 20th century was the creation of multiple sets of industrial relations systems working in tandem, the six State systems and the supplementary Commonwealth system.

For most of the 20th century, the conciliation and arbitration power served as the constitutional cornerstone of Commonwealth industrial relations law. This meant that the Commonwealth's remit was limited to setting up the machinery for dispute resolution (first through the Arbitration and Conciliation Commission, and then through the Industrial Relations Commission) and regulating the content of interstate disputes.

2.2 Constitutional Changes?

At various times, by introducing referenda to alter the Australian Constitution, the Commonwealth has sought to provide itself with an express, general power to legislate with respect to industrial relations. In total, four referenda were held between 1911 and 1946, each failing to succeed. Only the final referendum produced a popular majority but, even then, still failed to obtain a majority of votes in a majority of States.⁴

The proposal to give the Commonwealth sole responsibility on industrial relations matters was considered by the 1985 Hancock Committee. The subsequent report argued in favour of a centralised system with nationwide application. The Report identified three possible avenues to achieving this goal. The first was through a

² The Employment, Workplace Relations and Education Legislation Committee, *Provisions of the Workplace Relations Amendment (Work Choices) Bill 2005*, Australian Senate, November 2005 at p 17.

³ A distinct, though related, constitutional issue is whether all levels of the public sectors of the States can be subject to federal industrial relations laws.

⁴ See http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm,

constitutional amendment, although the Committee noted the obstacles of a referendum's success in the face of past failures. The second was to persuade the States to refer their industrial relations powers to the Commonwealth, although this was also considered unlikely given traditional State reticence and the difficulty in achieving consensus across all jurisdictions. The third option was to pass industrial relations laws pursuant to the corporations power in the Constitution (s 51(xx)). The Committee considered that, although potentially more expansive than the conciliation and arbitration power, any reliance on the corporations head of power would be contested and possibly declared invalid by the High Court. A further consideration was that the corporations power is subject to limitations of its own. For these and other reasons, the Committee ultimately favoured the option of a referendum to amend the Australian Constitution.⁵ No such referendum has since occurred.

Despite not adopting the recommendations of the Hancock Report, successive federal governments still sought to expand the Commonwealth's power to legislate on industrial relations matters, by exploring alternative constitutional approaches.

2.3 The External Affairs Power

Section 51(xxix) of the Constitution empowers the Commonwealth Parliament to make laws with respect to 'external affairs'. The Constitution does not elaborate on the meaning or ambit of 'external affairs', which has been left to the High Court. Over the years, the High Court has held that 'external affairs' relates to, amongst other things, Australia's ratification or implementation of a vast range of international instruments, such as treaties and conventions, as well as trade agreements.⁶

As such, the power was invoked in 1993 when the Keating Government made changes to the *Industrial Relations Act 1988* (Cth) that gave domestic effect to conventions of the International Labor Organisation (ILO), a specialised arm of the United Nations. These amendments covered a broad range of subject matter, including minimum wages, parental leave, discrimination, equal pay and the right to strike.

Victoria, with other States, brought proceedings against the Commonwealth ('the *Industrial Relations Act Case*'), arguing that the provisions relying on ratification of the ILO treaty were invalid as they fell outside the 'external affairs' powers of the Commonwealth. In considering the arguments, a joint judgement of the majority of the Court endorsed the view that:

To be a law with respect to 'external affairs', the law must be reasonably capable

⁵ See Keith Hancock et al, *Australian Industrial Relations Law and Systems: Report of the Committee of Review*, Australian Government Publishing Service, April 1985.

⁶ See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *The Tasmanian Dam Case* (1983) 158 CLR 1

of being considered appropriate and adapted to implementing the treaty.⁷

In the High Court's view, the test was satisfied in this case as the Commonwealth was implementing its obligations under the ILO conventions.

In effect, the Court's decision confirmed that, in appropriate cases, the external affairs power is an alternative head of power available to the Commonwealth to legislate with respect to industrial relations.

2.4 The Corporations Power

Section 51(xx) of the Australian Constitution provides that the Federal Parliament has power to make laws for the peace, order, and good government of the Commonwealth with respect to

Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

Over the course of the 20th century, the High Court favoured differing interpretations of the corporations power, starting with a narrower view derived from the now defunct doctrine of the reserved power of the States, to a more expansive approach, as formulated in 1971 in the *Concrete Pipes Case*. There the High Court ruled that the power could be read more broadly, to include any laws that have a sufficient connection to the trading activities of a constitutional corporation, and possibly even extending to any activity that relates to a constitutional corporation.⁸ Recognising the expanded scope of the corporations power, in its 1993 amendments to the *Industrial Relations Act 1988* (Cth), the Keating Government invoked it for certain provisions that would enable constitutional corporations to enter into collective enterprise agreements with employees that could override awards. Although this departed from the Commonwealth's traditional reliance on the conciliation and arbitration power, the States conceded the validity of its use with respect to enterprise bargaining.⁹

In 1996, the corporations power was invoked once more when the newly elected Howard Government enacted the *Workplace Relations Act 1996* (Cth), to provide for businesses to enter into and register individual agreements with employees. In 2000, the Howard Government released a series of discussion papers – *Breaking the Deadlock* – that examined the possibility of using the corporations power to massively expand the scope for Commonwealth industrial relations law, not entirely dissimilar to the Hancock Report before it. At the time, federal industrial relations law was still been primarily based on the conciliation and arbitration power, with the

⁷ *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at p 487

⁸ See *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468

⁹ George Williams, *Working Together: Inquiry into Options for a New National Relations Industrial System*, NSW Office of Industrial Relations, 2007 at p 14.

corporations and external affairs power applied only peripherally. In the summary of its 'case for change', the discussion paper states:

The paper raised for debate the merits of placing the system on a different constitutional footing, using the corporations power in the Constitution.¹⁰

The suggestion was that industrial relations might be uncoupled from its primary reliance on the conciliation and arbitration power and re-anchored in the corporations power. The perceived advantage was that it would then be able to regulate the workplace relations of constitutional corporations. To this end, relying on the corporations power, the Commonwealth introduced industrial relations related legislation, only for this to be unacceptably amended by the Senate.

In 2005, after the Howard Government had achieved majority control of the Senate, the *Work Choices* reforms were introduced based on the corporations power, with all its far-reaching constitutional and industrial implications.

Constitutionally, *Work Choices* was controversial in the way it altered the balance between State and Commonwealth powers by, essentially, allowing the Commonwealth to capture, in one fell swoop, the majority of industrial relations powers from the States – and with it, an overwhelming majority of employees.

The appropriateness of relying on the corporations power has been questioned. George Williams notes:

The extensive use of the corporations power in section 51(20) of the Constitution to found industrial relations law is unprecedented. While previous federal statutes have used the corporations power to extend what is in essence a conciliation and arbitration based system, *Work Choices* has effectively abandoned conciliation and arbitration and focuses directly on the corporation and its relationship.¹¹

In response, NSW and other States brought proceedings in the High Court challenging the constitutional validity of the new industrial laws.¹² In its judgement, the majority of the Court rejected the following arguments submitted by the States:

- That the corporations power must be read down, or restricted in its operation, by reference to the conciliation and arbitration power. The States submitted that when interpreting the power contextually, it is apparent that the Commonwealth is limited to legislating on industrial laws that relate only to the machinery of dispute settlement and handling of interstate disputes;

¹⁰ Department of Employment and Workplace Relations, *Breaking the Deadlock: The Case for Change*, October 2000 at p iii.

¹¹ George Williams, *Working Together: Inquiry into Options for a New National Relations Industrial System*, NSW Office of Industrial Relations, 2007 at p 34.

¹² See *New South Wales v Commonwealth* [2006] HCA 52

- That the power conferred by the corporations power is restricted to a power to regulate the dealings of constitutional corporations with persons or entities external to the corporation. It does not extend to those matters that are internal, such as with employees; and
- That any law relating to the corporations power must have some 'distinctive character' to it and that the fact that the corporation is a foreign, trading or financial corporation should be significant in the way in which the law relates to it. To this end, the Court interpreted the corporations power very broadly and recognised the validity of laws that merely relate to corporations, regardless whether the law relates to the 'foreign, financial or trading' nature of the corporation or not.¹³

Despite strong dissenting judgments from Justices Kirby and Callinan, the majority judgement confirmed the validity of the new industrial relations laws and allowed for its continued operation.

In reliance on the corporations power and by means of the *Work Choices* legislation the Commonwealth Government sought to move closer to the creation of a national industrial relations system. But, despite its greater breadth of coverage, the corporations power itself is subject to certain limitations. It cannot apply to those entities that are not constitutional corporations and the Commonwealth is therefore unable to legislate with respect to such entities. Generally, this includes unincorporated organisations, partnerships and sole traders, as well as State public sector agencies. Individuals employed under these entities still have their industrial coverage spread across the remaining State systems.

In light of the High Court's judgment, the continued relevance of the States' systems has been questioned. For example, the Australian Chamber of Commerce and Industry has stated:

NSW will not be able to justify continuing to spend \$60 million or \$70 million of taxpayers money on an industrial relations system with all of its infrastructure, all of its judges, all of its courts and all of its processes, where that system is simply applying to 10 or 20 per cent of the workforce.¹⁴ Likewise, the Explanatory Memorandum to the *Work Choices* legislation noted that:

... maintaining State jurisdictions for such a low proportion of workers may be too costly and difficult.¹⁵

¹³ Lenny Roth and Gareth Griffith, *The Workplace Relations Case, Implications for the States*, NSW Parliamentary Library Research Service, Briefing Paper 18/06, November 2006.

¹⁴ Peter Anderson, *Business tips one IR system in 10 years*, The Australian Financial Review, 15 November 2006 at p 10.

¹⁵ *Workplace Relations Amendment (Work Choices) Bill 2005*, E.M., p 9.

Suggesting the Howard Government's broader intentions, in 2002, the then Commonwealth Minister for Employment and Workplace Relations, the Hon. Tony Abbott, told Parliament when speaking on a Bill related to the Commonwealth takeover of unfair dismissal:

The [Howard] Government believes that an expansion of federal jurisdiction on this scale should eventually lead to a 'withering away of the states' at least in this aspect of workplace law.¹⁶

However, in order to complete this 'withering away of the States' in the industrial relations field there must be a referral of the relevant powers from the States to the Commonwealth.

3 THE REFERRAL OF MATTERS – GENERAL POWERS

3.1 What is the Referral Power?

One of the available constitutional mechanisms that facilitate cooperative federalism is the referral power found in section 51(xxxvii) of the Australian Constitution. Specifically, this head of power allows the Commonwealth 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.

This provision makes clear that a State (or States) may refer a specific matter to the Commonwealth Parliament and, in turn, the Commonwealth may enact legislation with respect to the referred matter.

The referral power is not a power to refer matters per se as the power does not enable the Commonwealth to refer to itself matters from the States that it deems desirable. Rather, the power enables the Commonwealth to make laws with respect to matters referred to it by the States.¹⁷ The emphasis on the powers of the Commonwealth Parliament ensures that laws made by it subsequent to a referral are Commonwealth laws that prevail over inconsistent State laws.¹⁸ As for the States, they may refer to the Commonwealth any matter within their jurisdiction. The power to do so is said to be drawn by implication from the Australian Constitution. On this issue, Justice Robert S French (as he then was) commented:

¹⁶ Tony Abbott, CPD (House of Representatives) 13 November 2002 at p 8853.

¹⁷ Justice Robert S. French, *The Referral of State Powers*, University of Western Australia Law Review, Volume 31(1), February 2003 at p 31.

¹⁸ Section 109 of the Commonwealth Constitution provides that 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

This precise question has not fallen for determination. However, it certainly seems at least plausible that the power to refer or adopt is a power conferred upon the parliaments of the various States, as an implied power by the Commonwealth constitution.¹⁹

The effect of section 51(xxxvii) is to allow for a reallocation of powers from the States to the Commonwealth and, in doing so, injects a level of flexibility into an otherwise rigid Constitution'.²⁰

Since Federation, there have been a number of referrals of power to the Commonwealth with respect to a wide range of subject matter, from meat inspection, to air transport, to relationship breakdowns. More recently, by referral of power, the Commonwealth has assumed responsibility to legislate on issues with respect to corporate law and terrorism. On occasion, some States have referred a particular matter to the Commonwealth, where others have declined to do so. This may be either because of a lack of preparedness of some States to relinquish control over a certain matter, or a certain matter may not be relevant to a State and therefore the question of referral does not arise.²¹

The advantages of the power are clear. In circumstances where it is most appropriate that the Commonwealth has the power to legislate, it allows a quick and easy enabling of the Commonwealth to act without requiring a cumbersome referendum with limited prospects of success, or attempts at mirror legislation, which can be delayed or amended due to political particularities in each State. Generally, the result is legislation that is uniform across all referring States, an important feature for some areas of the law. Because of its consensus driven nature, with referrals requiring agreement between the State and the Commonwealth, referrals are generally viewed more in terms of practicality and necessity than in more politically contentious ways.

3.2 The Nature of Referrals

There are two types of referral open to any State, a general subject matter referral with unlimited reference and, a more limited, text-based referral.

The first is a **general referral** where the State voluntarily relinquishes its power to legislate on a certain matter by handing over such power to the Commonwealth. In a general referral, the State cannot direct the Commonwealth how to exercise the referred power. Once a matter is referred, the State in effect provides the

¹⁹ Justice Robert S. French, *The Referral of State Powers*, University of Western Australia Law Review, Volume 31(1), February 2003 at p 31.

²⁰ Anne Twomey, *Federalism and the use of Cooperative Mechanisms to Improve Infrastructure Provision in Australia*, Public Policy, Vol 2 No 3 2007 at p 212.

²¹ For example, the creation of an integrated electricity grid on the east coast will not require Western Australia to refer its powers with respect to energy.

Commonwealth with a *carte blanche* to deal with the referred matter as it deems fit.²²

The second type of referral is a **text-based referral**. In these types of referrals, the States place in writing the exact words of the legislation the Commonwealth is to enact. Once legislation with respect to the referred matter is enacted, the Commonwealth may only make further modifications in accordance with any conditions set out under the reference. These types of references provide safeguards for the States against unfettered control by the Commonwealth over the subject matter referred.²³

In addition to the reference, States may enter into intergovernmental agreements with the Commonwealth which 'underpin the capacity conferred on the Commonwealth Parliament to amend the referred law'.²⁴ For example, an agreement may provide that the Commonwealth will give the State six months advance notice before any amendments are made to the referred law.²⁵ To this end, it allows the State to retain some degree of involvement with respect to the exercise of laws made pursuant to its referral.

There has been significant debate with respect to the operation and limits of any reference. These issues include:

- Whether a State referring a matter can legislate concurrently with the Commonwealth with respect to the referred matter;
- Whether a reference can be revoked;
- Whether a State can refer a matter for a stipulated length of time, after which, the reference expires; and
- Whether Commonwealth laws enacted in reliance on a reference remain valid once the reference is repealed, is amended or expires.

3.3 Concurrency of State and Commonwealth Laws

The High Court considered the question of the concurrent operation of Commonwealth and State laws in *Graham v Preston*. In that case, the defendant –

²² George Williams, *Working Together: Inquiry into Options for a New National Relations Industrial System*, NSW Office of Industrial Relations, 2007 at p 53.

²³ George Williams, *Working Together: Inquiry into Options for a New National Relations Industrial System*, NSW Office of Industrial Relations, 2007 at p 53.

²⁴ Anne Twomey, *Federalism and the use of Cooperative Mechanisms to Improve Infrastructure Provision in Australia*, Public Policy, Vol 2 No 3 2007 at p 213.

²⁵ See, for example, the intergovernmental agreements that underpinned Victoria's referral to the Commonwealth on matters relating to industrial relations.

a bakery owner – sold a loaf of bread for 8 pence, above the regulated maximum of 7 pence as per Queensland's *Profiteering Prevention Act 1948*. The defendant argued that the Queensland act was *ultra vires* because the Queensland Parliament had forfeited its ability to make laws on profiteering and prices when it referred such matters to the Commonwealth under Queensland's *Commonwealth Parliament Act 1943*. The High Court rejected this argument, endorsing the view that a reference only bestows an additional power on the Commonwealth that is not designed to subsequently diminish or deprive a State of its power with respect to the matter.²⁶ The result is that the State retains, while the Commonwealth receives, concurrent power to legislate with respect to the same subject matter.

The referral power merely enables the Commonwealth to make laws with respect to a referred matter, without actually obliging the Commonwealth to make such laws. As such, a State would not face any impediments should it legislate with respect to a referred matter in circumstances where the Commonwealth has failed to do so.

However, in circumstances where both the State and Commonwealth legislate with respect to a referred matter, the State hits a constitutional roadblock with a possible conflict of laws. For example, what happens when both the State and the Commonwealth legislate with respect to the same matter? Section 109 of the Constitution provides that:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Therefore, if the Commonwealth enacts legislation in reliance on a reference and the referring State enacts inconsistent legislation on the same matter, the Commonwealth legislation invalidates the State legislation to the extent of the inconsistency. To this end, the State's authority on the matter is diminished by the constitutional pre-eminence afforded to Commonwealth legislation. Despite the theoretical acceptance of concurrent State and Commonwealth legislation, a State would be ceding some of its own authority to the Commonwealth when it refers matters by virtue of section 109.

3.4 The Revocation of References

In the lead up to Federation, this was a matter fraught with controversy during the Convention Debates. The view emerged during the Convention Debates that any referred power was irrevocable. The Hon. Isaac Isaacs took the firm view that:

If a State refers a matter to the Federal Parliament, after the Federal Parliament has exercised its power to deal with the matter, the State ceases to be able to

²⁶ *Graham v Preston* (1950) 81 CLR 1

interfere in regard to it... and nothing less than the federal authority can get rid of it.²⁷

Later, Latham CJ held a contrary view in *Graham v Paterson* when his Honour contended, in *dicta*, that:

Such a contention would involve the proposition that a State Parliament can pass an unrepealable statute, or at least that any attempt to repeal an Act referring a matter under s.51(xxxvii.) would necessarily produce no result. The result of the adoption of such a suggestion would be that one State Parliament could bind all subsequent Parliaments of that State by referring powers to the Commonwealth Parliament.²⁸

It has always been Westminster convention that Parliament can repeal whatever it can enact. The question of revoking references remains unanswered, as the High Court is yet to provide a determinative view.

3.5 The Expiration of References

Can a State refer a matter for a stipulated length of time, after which the reference expires and the State resumes control of the matter? This issue was considered by the High Court in *R v Public Vehicles Licensing Appeal Tribunal (Tas)*. In this case, Tasmania referred powers to the Commonwealth with respect to air transport matters. However, when passing the referral legislation – the *Commonwealth Powers (Air Transport) Act 1952 (Tas)* – Tasmania inserted a provision allowing for the possible termination of the reference at a date to be fixed by proclamation.

The High Court held that, given the referral power is silent with respect to the period of reference, an Act that refers a matter for a specified duration, or limited by a possible future event, is valid.²⁹ The Court said:

It is plain enough that the Parliament of a state must express its will and it must express its will by enactment. How long the enactment is to remain in force as a reference may be expressed in the enactment. It nonetheless refers the matter. Indeed the matter itself may involve some limitation of time or be defined in terms which involve a limitation of time... There is no reason to suppose that the words “matters referred” cannot cover matters referred for a time which is specified or which may depend on a future event even if that event involves the will of the State Governor-in-Council and consists of fixing a date by proclamation.³⁰

The effect of this is that a State may refer a matter for a defined period.

²⁷ *Official Record of the Debates of the Australasian Federal Convention* (Third Session), Melbourne, 1898 at p 223.

²⁸ *Graham v Preston* (1950) 81 CLR 1, [11]

²⁹ *R v Public Vehicles Licensing Appeal Tribunal (Tas)* (1964) 113 CLR 207

³⁰ *R v Public Vehicles Licensing Appeal Tribunal (Tas)* (1964) 113 CLR 207, p 226

Alternatively, a State may insert a self-executing sunset clause in its reference that terminates the reference on fulfillment of certain conditions. Either way, this issue appears settled.

On this issue, Anne Twomey writes:

This [power] can be used as a stick to prevent the Commonwealth's abuse of its power with respect to the referred matter and provide the States with some protection in the event of the power being interpreted in an unexpected manner.³¹

3.6 Validity of Laws after Revocation or Expiration of References

The High Court has not determined what happens to Commonwealth laws made in reliance on a reference that is subsequently revoked or has expired.³²

However, Justice French has contended, extra-judicially, that:

...absent any other provision, it would be expected that such a 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.³³

Meanwhile, Justice Windeyer held the view in *Airlines of New South Wales Pty Ltd v New South Wales*³⁴ that a law made with respect to a power that was referred for a specified period of time would only operate for the duration of the reference.³⁵

4 THE REFERRAL OF MATTERS – THE INDUSTRIAL RELATIONS POWER

4.1 The Referral by Victoria

In 1996 Victoria became the first State to refer its power to make laws with respect to industrial relations over to the Commonwealth by enacting the *Commonwealth Powers (Industrial Relations) Act 1996*. The Act specifically referred to the Commonwealth matters relating to:

³¹ Anne Twomey, *Federalism and the use of Cooperative Mechanisms to Improve Infrastructure Provision in Australia*, Public Policy, Vol 2 No 3 2007 at p 213.

³² Pamela Tate S.C., *New Directions in Co-operative Federalism: The Referrals of Legislative Power and their Consequences*, delivered at Constitutional Law Conference, Sydney, 18 February 2005.

³³ Justice Robert S. French, *The Referral of State Powers*, University of Western Australia Law Review, Volume 31(1), February 2003 at p 33.

³⁴ *Airlines of New South Wales Pty Ltd v New South Wales* (1964) 113 CLR 1

³⁵ George Williams, *Working Together: Inquiry into Options for a New National Relations Industrial System*, NSW Office of Industrial Relations, 2007 at p 54.

- the conciliation and arbitration for dealing with disputes in Victoria;
- agreement-making in Victoria;
- minimum terms and conditions of employment for employees, including minimum wage;
- termination of employment; and
- freedom of association.

The Act also specified the matters that were not referred to the Commonwealth, and thereby retained by Victoria. These included:

- workers compensation;
- occupational health and safety;
- apprenticeships;
- long service leave; and
- matters concerning the employment of public sector employees and law enforcement officers.

According to the Second Reading speech, the object of the referral was to instigate the push toward a nationally integrated industrial relations regime, thereby removing 'artificial inhibitions' on economic investments.³⁶ It was also envisaged that such a referral would allow for easier access to Commonwealth awards, without the need for creating what had become recognised as, 'fictional interstate disputes' to overcome constitutional technicalities. Further discussion on the merits and shortcomings of a unified industrial relations system can be found below.

At the same time, the Commonwealth Parliament passed the *Workplace Relations and Other Legislation Amendment Act (No 2) 1996 (Cth)* to allow the Commonwealth to 'receive' the referred matter. With respect to the Bill, it was noted:

The scope of the Bill is in large measure determined by the 'matters' formally conferred on the Commonwealth by the Victorian Parliament via [the Victorian Bill]. The potential reach of Commonwealth law is further restricted by certain implied constitutional limitations on the capacity of the Commonwealth to pass laws which may affect functions of a State which are critical to its capacity to function as a government.³⁷

Ostensibly, the referral was designed to remove the State tier from being an active player in industrial relations regulation. However, the referral was criticised for not properly transferring all employees previously under the State system to the Commonwealth and subsequently leaving a considerable number of workers

³⁶ Hon. Jeff Kennett, VPD (House of Assembly), 13 November 1996 at p 1300.

³⁷ B Bennett, *Workplace Relations and Other Legislation Amendment Bill (No 2) 1996*, Australian Parliamentary Library Bills Digest No 66, December 1996.

(mainly the low-paid) without comprehensive industrial protection.³⁸ In response, the Victorian Government commissioned a Taskforce to examine the situation of workers not covered by federal awards or agreement. The Taskforce did not take a position on whether the referral be rescinded, but did recommend the passage of new industrial laws to cover unprotected workers.

In 2000, the Victorian Government introduced the *Fair Employment Bill 2000* which would have partially restored Victoria's industrial relations system. However, the Bill was defeated in the Legislative Council and has not been reintroduced. Victoria then sought to address the situation of unprotected workers by referring further powers to the Commonwealth. This enabled the Commonwealth to pass complimentary legislation that deems federal awards as common rule in Victoria, while empowering Victorian tribunals to cover the field in circumstances where the Commonwealth fails to act.³⁹ This was achieved through the *Federal Awards (Uniform System) Act 2003* (Vic). On the Victorian experience, George Williams notes:

Despite the serious problems encountered as a result of the referral of powers, Victoria has never been inclined to revoke the referral and recreate its own fully-fledged industrial system. Once a State system is gone, it may be incapable of being restored.⁴⁰

4.2 The Commonwealth's Position

Before the 2007 Federal Election, the Federal Labor Party announced its *Forward with Fairness* policy, promising that if elected:

A Rudd Labor Government will rely upon all of the Constitutional powers available to it in government to legislate national industrial relations laws. Labor will work cooperatively with the States to achieve national industrial relations laws for the private sector. This will be achieved either by State Governments referring powers for private sector industrial relations or other forms of cooperation and harmonisation.⁴¹

In accordance with its *Forward with Fairness* policy, in June and July 2009, the Commonwealth *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (Cth) came into force. The Act facilitates the creation of a

³⁸ See Ronald McCallum, *Independent Report of the Victorian Industrial Relations Taskforce*, Victorian Industrial Relations Taskforce, August 2000.

³⁹ Peter Gahan, *The Future of State Industrial Regulation: Can we learn from Victoria?*, Symposium: State Systems of Industrial Relations, Australian Review of Public Affairs, 14 November 2005.

⁴⁰ George Williams, *Working Together: Inquiry into Options for a New National Relations Industrial System*, NSW Office of Industrial Relations, 2007 at p 48.

⁴¹ *Forward with Fairness*, Labor's plan for fairer and more productive Australian workplaces, April 2007 at p 6.

national workplace relations system by allowing the Commonwealth to receive industrial relations matters referred to it by the States.

In the Second Reading Speech, Senator the Hon. Nick Sherry noted:

This Bill will amend the Fair Work Act to enable States to refer matters to the Commonwealth with a view to establishing a uniform national workplace relations system for the private sector...

... The Bill establishes a framework that can be adapted in future Commonwealth legislation to accommodate anticipated future referrals from other States.

Consistent with Government policy, the Bill enables referring States to decide the extent to which their public sector workforces should be covered by the new system.⁴²

To this end, the Commonwealth Minister for Employment and Workplace Relations, the Hon. Julia Gillard, has encouraged the States (and in particular, NSW) to refer its industrial relations powers. In a recent radio interview, Minister Gillard said:

I am in discussions with my New South Wales counterpart and my Queensland counterpart about the prospects of referral. Those discussions continue and I'm very optimistic that we will be able to move to referrals from a large number of States to the Federal Government and that would be an important move for a seamless national economy...

Later adding in the same interview:

We have legislated to the full extent of our constitutional competence... If a State chooses to hold out against the national system, then it will be a matter for them to explain to the business community why they think it's fine for their State to have competing systems, duplication, confusion and two sets of laws.⁴³

4.3 The Position of Other States

Although **Victoria** referred much of its industrial relations powers to the Commonwealth in 1996, a second referral was achieved through passage of the *Fair Work (Commonwealth Powers) Act 2009* (Vic). The second referral was considered necessary because the initial referral related to legislation – the *Workplace Relations Act 1996* (Cth) – that was primarily predicated on the conciliation and arbitration power whereas the *Fair Work Act* is primarily predicated on the corporations power. In the absence of a new referral, the Victorian Government was concerned that the reorientation of constitutional foundations in the legislation meant Victorian employees who are not employed by a

⁴² Senator the Hon. Nick Sherry CPD (Senate) 15 June 2009 at p 3090.

⁴³ [Radio National Breakfast](#), Australian Broadcasting Corporation, 11 June 2009.

constitutional corporation would be excluded from the *Fair Work* regime.⁴⁴

The second referral is text-based and gives the Commonwealth the authority to legislate with respect to Victoria's entire private sector workforce. The second referral also contains exemptions similar to the ones made in the previous referral, mostly relating to 'core government functions, such as the number, identity, appointment and redundancy of public sector employees, and issues related to essential services employees and the police'.⁴⁵

To date Victoria is the only state to refer its industrial powers to the Commonwealth (having done so twice), with the referral in effect from 1 July 2009.

South Australia has indicated its intention to refer its industrial powers to the Commonwealth to cover unincorporated employers and their employees in the private sector via a text-based referral.⁴⁶ The referral will exclude public sector and local government employees and still allow for the operation of certain State industrial laws, including occupational health and safety and public sector dispute resolution. Under the deal negotiated with the Commonwealth Government, South Australian industrial agencies will provide services supplementary to a national system, such as education resources and enforcement services. South Australia's participation in the national system is due to take effect from 1 January 2010.⁴⁷

Tasmania has similarly announced its intention to refer its industrial powers via a text-based referral to the Commonwealth. However, it has also identified a number of matters to be resolved with the Commonwealth.⁴⁸

Queensland has announced its in-principle support to participate in the national system, but that participation is 'subject to a number of key threshold issues being resolved'.⁴⁹ These matters relate to ensuring employees under State awards and agreements have their entitlements protected once they migrate to the new system as well as ensuring Queensland retains an appropriate level of input with respect to further reforms.

⁴⁴ Hon. Rob Hulls MP, *Second Reading Speech*, VPD (Legislative Assembly), 2 June 2009 at p 1437.

⁴⁵ Steve O'Neill and Mary Anne Neilsen, *Fair Work (State Referral and Consequential and Other Amendments) Bill 2009*, Australian Parliamentary Library, Bills Digest No 168, June 2009 at p 6.

⁴⁶ Explanatory Statement, *The Context for South Australia's Decision to Participate in the National System of Industrial Relations*, June 2009 at <http://www.safework.sa.gov.au>

⁴⁷ *South Australia to refer private sector IR coverage to Canberra*, 9 June 2009 at <http://www.workplaceexpress.com.au>

⁴⁸ Communiqué from Australian State, Territory and New Zealand Workplace Relations Ministers' Council, 11 June 2009 at <http://www.workplace.gov.au>

⁴⁹ Hon. Cameron Dick MP, *Ministerial Media Statement: Qld provides in-principle support for National IR reforms in the private sector*, 11 June 2009 at <http://www.qld.gov.au>

Western Australia has indicated that it is 'highly unlikely' that it would refer its IR powers to the Commonwealth.⁵⁰ Instead, the WA Government has pledged to work cooperatively with the Commonwealth and has commissioned an independent review of its industrial relations system with a view to harmonising State and Commonwealth laws.⁵¹

4.4 The Position of New South Wales

In 2007, the then Minister for Industrial Relations, the Hon. John Della Bosca commissioned an inquiry into the NSW Industrial Relations System, assessing its future prospects in light of *Work Choices* and examining possible models of reform. According to the terms of reference, the aim of the inquiry was:

... to advise the NSW Government how a fair and harmonised national industrial relations system that appropriately balances the interest of employees and employers could be put in place, in partnership between the Commonwealth and the State of New South Wales.⁵²

The final report, *Working Together: Inquiry into Options for a New National Industrial Relations System*, was published by constitutional law professor, George Williams. The report examined the desirability of having a national industrial relations system.

Williams is on record supporting such a system, writing:

It is long past time that Australia had a national system of industrial relations law. As a small country with an integrated national economy, we are not well served by having seven legal regimes on a topic as basic as employment.⁵³

Despite these sentiments, Williams fell short of recommending a full referral of State powers in his report. Instead, Williams opted for a national system based on cooperative federalism.

Williams identifies alternative legislative mechanisms that would create the national system. The first mechanism identified is by a text-based referral, but through a two-reference process. The first reference would be the specific text agreed on by all States to enact the new national law. The second reference would allow the Commonwealth to amend the law in accordance with a stipulated process to

⁵⁰ Hon. Troy Buswell, *Ministerial Media Statement: WA unlikely to hand over its powers to Canberra*, 8 November 2008 at <http://www.ministerialstatements.wa.gov.au>

⁵¹ *Independent Review of the State Industrial Relations System: Terms of Reference*, July 2009, at <http://www.commerce.wa.gov.au>

⁵² George Williams, *Working Together: Inquiry into Options for a New National Relations Industrial System*, NSW Office of Industrial Relations, 2007 at p 4.

⁵³ George Williams, *Too many systems breed disharmony*, *The Australian*, 31 January 2008.

ensure that the States are given adequate notice and the ability to provide input.

The second mechanism identified by Williams is the creation of uniform legislation based on the Commonwealth enacting template legislation, which is subsequently adopted by the States. This mechanism similarly sets out a procedure for any amendments to the law.

According to Williams:

In either case, only one national law will be enacted by the Commonwealth. The text of that law will be agreed upon by all participating jurisdictions, and will amend or repeal the Commonwealth's present industrial relations law and set out new law. The national law will operate directly in a State where based upon a referral, or will otherwise be applied in a State due to the State's uniform application legislation.

Both mechanisms allow the Commonwealth to enact a comprehensive law (comprising one or more separate statutes) for industrial relations that falls outside of its current powers... Amendments to the law will be enacted by the Commonwealth parliament for all participating jurisdictions. The amendments will operate directly in those States that have referred power, and will operate by way of automatic adoption in those States that choose the uniform legislation model.⁵⁴

Despite commissioning the inquiry, the NSW Government did not formally respond to it, perhaps recognising that the policies of the Federal Labor Party in the lead up to the 2007 federal election foreshadowed a further change in industrial relations laws. Subsequently, the NSW Government has provided partial support for referring its remaining industrial relations powers. However, it has been reported that NSW seeks to retain powers with respect to public and Catholic sector school teachers, together with some community sector workers.⁵⁵

A full decision on whether a referral will occur – and if so, to what extent – will not be made until all the remaining elements of the Commonwealth Fair Work legislative reforms have been enacted.⁵⁶ In a submission to the Senate Education, Employment and Workplace Relations Committee, the NSW Minister for Industrial Relations, The Hon. John Hatzistergos, stated:

The NSW Government has also made it clear that any decision about whether and how to join in a national system, whether by way of a referral, mirror laws or other forms of harmonisation, depends very much on the final form of the laws enacted

⁵⁴ George Williams, *Working Together: Inquiry into Options for a New National Relations Industrial System*, NSW Office of Industrial Relations, 2007 at p 91.

⁵⁵ Steve O'Neill and Mary Anne Neilsen, *Fair Work (State Referral and Consequential and Other Amendments) Bill 2009*, Australian Parliamentary Library, Bills Digest No 168, June 2009 at p 7.

⁵⁶ Communiqué from Australian State, Territory and New Zealand Workplace Relations Ministers' Council, 11 June 2009 at <http://www.workplace.gov.au>

by the Australian Parliament and how it affects the rights and obligations of employers and workers in NSW.⁵⁷

In the same submission, the Government identified some of the benefits in retaining the NSW system, noting:

While NSW acknowledges the view that may be held by some that it would be important to provide certainty to employers and employees by providing ... for the complete ousting of certain State laws ... alternative strategies could be adopted, such as leave some choice to employers and employees about which system suits them best.⁵⁸

5 THE DEBATE OVER A NATIONAL SYSTEM

Central to any decision for a State to refer its industrial relations powers to the Commonwealth is the question of the desirability of establishing a centralised, national system. While the *Work Choices* changes represented a huge leap toward the creation of a fully national system, certain exceptions remained. As noted, many in the State public sector and employees of unincorporated organisations fall outside the national scheme. A referral by each of the States is needed for the completion of the national system.

Many of the arguments, on either side of the debate, relate to the content and merits of a unified industrial relations system, while others relate to the importance of federalism in Australian constitutionalism.

5.1 Arguments in Favour of a National System

Both the 1985 Hancock report and 2000 Discussion Paper, *Breaking the Gridlock*, together with other commentaries, identified the following problems with having multiple industrial relations systems.

Inefficiency – There are often two sets of laws covering the same workplace. The different systems create a great deal of cost for the taxpayer to maintain as well as excess legal and compliance costs for individual workplaces. The inefficiency is exacerbated by the duplication of provisions.⁵⁹

⁵⁷ Hon. John Hatzistergos submission to Senate Education, Employment and Workplace Relations Committee, 9 January 2009 at http://www.industrialrelations.nsw.gov.au/pdfs/Jan09_Senate_Submission.pdf, accessed 26 August 2009.

⁵⁸ Hon. John Hatzistergos submission to Senate Education, Employment and Workplace Relations Committee, 9 January 2009 at http://www.industrialrelations.nsw.gov.au/pdfs/Jan09_Senate_Submission.pdf, accessed 26 August 2009.

⁵⁹ Department of Employment, Workplace Relations and Small Business, *Breaking the Gridlock: Towards a Simpler National Workplace Relations System, Discussion Paper 1: The Case for Change*, 2000 at p 14.

It is argued that Australia has a comparatively small population in an increasingly integrated global economy, in which context we must be 'as nimble as possible in adapting to changing circumstances'.⁶⁰ The multiplicity of jurisdictions and laws creates an immediate barrier, it is argued, if the need arises to have uniform, nationwide application of a particular law and quick passage of the legislation is required.

When former Prime Minister, the Hon. John Howard, signaled his intention to create a national industrial relations system, he said:

...the system of overlapping Commonwealth and State awards is too complex, costly and inefficient ... in an age when our productivity must match that of global competitors, forcing Australian firms [that operate nationally] to comply with six different workplace relations systems is an anachronism we can no longer afford.⁶¹

On the benefits of having one industrial relations system, Anne Twomey writes:

There could well be good grounds for arguing that industrial relations should be a matter for the federal government. It could result in greater efficiency and it may be so closely related with the management of the national economy that it is better dealt with on a national level. Indeed, in most federal countries, industrial relations appears to fall within either the exclusive or concurrent powers of the national level of government.⁶²

Uncertainty – The complicated nature of having industrial relations law split amongst jurisdictions leads to uncertainty and confusion, for employees and businesses alike.

The uncertainty is exacerbated when different Commonwealth and State laws apply to the same workplace. For example, since the *Fair Work* reforms, both the *Fair Work Act 2009* (Cth) and relevant State laws have provisions with respect to long service leave. Which Act applies depends on a series of circumstances, including whether an employee is covered by a modern award, pre-modernised award or enterprise agreements, as well as the commencement date of the award or agreement.⁶³

⁶⁰ Employment, Workplace Relations and Legislation Committee, *Provisions of the Workplace Relations Amendment (Termination of Employment) Bill 2009* at pp 26 – 27.

⁶¹ Hon. John Howard, *Prime Ministerial Statement on Workplace Relations*, Parliament of Australia, 26 May 2005 at pp 8 – 9.

⁶² Anne Twomey, *Australian Federalism – Options for Reform*, Conference on Australian Federalism, Queensland Department of Employment and Industrial Relations, 13 September 2007.

⁶³ For more information on long service leave, see http://www.fairworkaustralia.ahri.com.au/docs/fwrc_long_service_leave_factsheet.pdf, accessed 26 August 2008.

Jurisdictional Issues – The multiplicity of jurisdictions give rise to demarcation disputes where courts and tribunals may be required to spend time deciding the appropriate jurisdiction to hear a matter. At times, the one matter may need to be dealt with across different tribunals depending on different aspects of the dispute.

Creighton and Stewart have commented that:

The existence of federal and local regimes in each State might be supportable if it were possible to draw a simple and predictable line of demarcation between them. Since this is not the case, it is hard to see what justification there can be for maintaining dual jurisdiction.⁶⁴

Equality – There may be a level of inequality amongst the same type of employees in different States where ‘different working conditions are applicable depending on the State the employee is engaged’.⁶⁵ A unitary system would ameliorate such differences and ensure that comparable workers are receiving comparable wages and conditions.

Forum Shopping – The duplication of systems enables parties to ‘shop’ around to find the jurisdiction that gives them the best result, or where a party seeks to gain in one jurisdiction what may be denied or refused in another.⁶⁶ Historically, unions have adopted this practice when manufacturing disputes to enable them access to the Commonwealth scheme, to either seek nationwide application for a certain sector, or where the Commonwealth would likely yield a more favourable outcome.⁶⁷ The argument is that this practice undermines the integrity of the law in any one jurisdiction.

5.2 Arguments Against a National System

The Benefits of Federalism – Proponents of ‘competitive federalism’, the idea that horizontal competition (between States) and vertical competition (between the States and the Commonwealth), maintain that such governmental arrangements can lead to better policy initiatives and reform.

It is beyond the scope of this paper to assess the merits of federalism generally or

⁶⁴ Breen Creighton and Andrew Stewart, *Labour Law 4th ed.*, The Federation Press, Sydney 2005 at p 115.

⁶⁵ Joe Catanzariti, ‘What should the IR system in NSW look like?’, Industrial relations Society of NSW, Annual Convention, Blue Mountains, 13 May 2005 at pp 2 – 3.

⁶⁶ Department of Employment, Workplace Relations and Small Business, *Breaking the Gridlock: Towards a Simpler National Workplace Relations System, Discussion Paper 1: The Case for Change*, 2000 at p 14.

⁶⁷ See Lenny Roth, *Industrial Relations Reforms: The Proposed National System*, NSW Parliamentary Library Research Service, Briefing Paper No 11/05, November 2005 at pp 4 – 5.

of the Australian Federation in its totality. It is enough to note some of the key arguments made on behalf of federal constitutional arrangements.

The Parliament of Victoria's report, *Australian Federalism: The Role of the States*, summarised the case for federalism in these terms:

In contrast to unitary government, federalism promotes specific values. A federal system of government enables citizens to have a degree of local autonomy. The existence of distinct constituent governments allows for greater variety and diversity in responding to public problems, with sensitivity to regional needs in a continent-sized country. It creates a competitive environment for democratic and liberal values, and for public policy solutions.⁶⁸

Competitive federalism, the argument states, allows jurisdictions to experiment with various policies to achieve a better outcome. States can learn from the experiences of other States and choose to adopt, or sometimes reject, alternative approaches.

For example, it has been argued that:

...[multiple systems] allow for diversity and for improvements through the rivalry and demonstration effects that flow from competitive federalism. For all the drawbacks of the inconsistencies of [multiple systems], a consistently bad industrial relations framework would be worse.⁶⁹

National Approaches Undermine Federalism – Undoubtedly, since Federation, the power of the Commonwealth has grown at the expense of the States. While Australia's constitutionalism is predicated on multi-tiered government, further consolidation of Commonwealth power erodes the basis of Australian federalism. This concern was flagged during the Convention Debates when Dr John Quick argued on the general nature of referrals:

My principal objection ... is that it affords free and easy method of amending the Federal Constitution without such amendments being carried into effect in the manner provided by this Constitution.⁷⁰

Although not speaking directly on the issue of industrial relations, the current debate illustrates his concern that the Commonwealth will assume near-universal power with respect to industrial relations without having such authority expressly provided for in the Constitution. When *Work Choices* was being debated,

⁶⁸ Parliament of Victoria, Federal-State Relations Committee, *Australian Federalism: The Role of the States*, October 1998.

⁶⁹ Western Australian Chamber of Commerce and Industry quoted by Hon. John Della Bosca, speech delivered at Industrial Relations Society of NSW Annual Convention Blue Mountains, 13 May 2005.

⁷⁰ *Official Record of the Debates of the Australasian Federal Convention* (Third Session), Melbourne, 1898 at p 218.

Professor Greg Craven referred to it as:

...undoubtedly a major assault on federalism.⁷¹

While discussion about the merits of a national industrial relations law is appropriate, the argument raised here is that such a discussion should not occur divorced from its implications for Australian federalism.

The NSW System is Better and Fairer – One of the most vigorous arguments against a single Commonwealth-run industrial relations system is the perceived superiority of the scheme currently in place in NSW.

On the suggestion that the NSW system could be dismantled, the Public Service Association commented:

The PSA is completely opposed to this as the NSW system provides for common rule awards which apply to all workers in a particular industry and have unlimited provisions for what it can contain... Workers have superior unfair dismissal rights. And NSW has superior Occupational Health and Safety legislation to that of other states or the type of legislation that has been widely suggested for a national system.

The (Office of Industrial Relations) has been far more efficient than the federal Department of Workplace Relations in ensuring agreements and awards adhere to the relevant legislation.⁷²

The NSW Minister for Industrial Relations, the Hon. John Hatzistergos recently submitted:

The NSW system is preferred: A considerable additional proportion of NSW's employers have continued to apply NSW industrial relations standards even though ...they are now covered by Commonwealth legislation...

... Thus, as a result of recognising that the vast majority of this State's employers and employees continue to operate under or through the influence of the NSW industrial relations system, the NSW Government continues to provide services to these employers and their employees.⁷³

⁷¹ [7:30 Report](#), Australian Broadcasting Commission, 12 April 2005.

⁷² *Protecting the NSW Industrial Relations System*, Public Service Association of NSW, 22 September 2008 at http://www.psa.labor.net.au/decisions/1226275697_30716.html, accessed 26 August 2009.

⁷³ Hon. John Hatzistergos submission to Senate Education, Employment and Workplace Relations Committee, 9 January 2009 at http://www.industrialrelations.nsw.gov.au/pdfs/Jan09_Senate_Submission.pdf, accessed 26 August 2009.

6 CONCLUDING REMARKS

Since Federation, there has been a contraction of power away from the States and toward the Commonwealth with respect to industrial relations. Early attempts at constitutional amendment gave way to alternative ways of expanding the Commonwealth's remit by enacting laws that relied on a suite of constitutional powers. With the *Work Choices* reforms, and the *Fair Work* reforms that succeeded it, there has been a move towards creating a Commonwealth system with broader application. In the ongoing swings and roundabouts of industrial relations law in Australia, further reform may be on the horizon if the States decide to refer their remaining industrial relations powers to the Commonwealth.