



The Constitution and industrial relations: is a unitary system achievable?

This research brief examines the extent of the Commonwealth’s power under the Australian Constitution to establish a single national industrial relations system.

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Law and Bills Digest Section

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Related papers

Related papers on this issue include:

- [Internet guide to parliamentary documents on the passage of the Workplace Relations Amendment \(Work Choices\) Bill 2005](#)
- [Workplace relations reforms: a chronology of business, community and Government responses](#) (includes a chronology and links to documents from 28 September 2004 onwards)
- [Work Choices: A New Workplace Industrial Relations System—A Summary](#) (Parliament House users only; last updated 25 October 2005)
- [Federal workplace relations plans and the States in 2005](#) (Parliament House users only; last updated 18 October 2005)
- [Workplace Relations Legislation: Bills Passed, Rejected or Lapsed, 38th–40th Parliaments \(1996–2004\)](#) (E-brief, 8 July 2005)

Summary of Key Points

Introduction

- The drafters of the Australian Constitution only gave the Commonwealth the ability to make laws on some 40 specific subjects or 'heads of power'. Commonwealth legislation must be sufficiently connected with or, in the words of the Constitution, be 'with respect to' one of these heads of power to be valid.
- The Commonwealth was given strictly limited authority over industrial relations: it was only allowed to make laws for the 'conciliation and arbitration' of 'interstate disputes' over 'industrial matters'.
- The Commonwealth and the States maintain six separate but overlapping industrial relations systems. There is no clear demarcation between federal and state systems, and employers must often comply with more than one set of obligations.
- Attempts to give the Commonwealth more industrial relations power in a number of referenda have been unsuccessful. Victoria 'referred' key industrial relations powers to the Commonwealth in 1996 but a similar referral from other States seems unlikely.
- The remaining option for creating a single federal industrial relations system is to use other 'heads of power' in the Constitution such as the corporations power.

Part One – Constitutional Powers

Labour power – s. 51 (35)

- The labour power in s. 51 (35) of the Constitution has been the main vehicle for federal regulation of industrial relations.
- But this power is strictly limited. It allows machinery to be created for the prevention and settlement of certain types of dispute, but does not allow the Commonwealth to legislate directly on central aspects of employment such as wages.
- The other main limitation is the need for a dispute 'extending beyond the limits of any one State', that is, an *interstate* dispute. Issues involving workers in only one state are outside Commonwealth jurisdiction under the wording of s. 51(35).
- These limitations restrict both the types of laws the Commonwealth can enact using the labour power, and the range of issues that federal bodies such as the AIRC or the proposed Fair Pay Commission can resolve.

- Before the 1990s, federal governments made little use of other powers in the Constitution to make laws on workplace relations, largely because of concern about encroaching on the authority of the states.
- But this sensitivity to states' rights was abandoned with the Keating Government's *Industrial Relations Reform Act 1993* and the Howard Government's *Workplace Relations Act 1996*, both of which made use of alternative powers, especially those over corporations and external affairs.

Corporations power – s. 51 (20)

- The centrepiece of the Howard Government's plan to create a unitary industrial relations system in its Work Choices legislation is to make greater use of the 'corporations power' in section 51(20) of the Constitution.
- The High Court is the final arbiter on the scope of the corporations power. Instead of providing definite criteria as to who and what falls within the corporations power, the High Court has preferred an incremental, case by case approach. This means it may be difficult to determine whether a particular employer or workplace activity comes under Commonwealth law.
- The High Court has yet to provide a definitive judgment on who or what can be regulated by Commonwealth workplace relations laws made under the corporations power.

Who can be regulated?

- A central issue for the High Court will be to what extent the *corporations* power authorises laws about *individuals*. Does the Commonwealth's power to make laws with respect to *corporations* allow it to regulate the working conditions of *people* merely because they work for a corporation or have dealings with a corporation in some other way?
- The tests developed by the High Court for determining whether a body is a 'trading' or 'financial' corporation and therefore within federal power under s. 51 (20) are commonsense. Nevertheless many bodies may need legal advice to know whether they come within these terms and are subject to federal law.
- Moreover these tests are not set in stone. If the High Court overruled its current position and accepted a 'prime purpose' test, a larger number of Australian incorporated entities may be outside the definition of a 'constitutional corporation'. Their employees would therefore be beyond the scope of Commonwealth workplace relations regulation under the corporations power.

- The area where there may be most doubt about whether federal industrial relations law applies is Australia's large 'not-for-profit' sector. In March 2005 the Australian business journal *BRW* claimed that the 'not-for-profit' sector in Australia was worth \$70 billion per year, accounting for almost 10 per cent of the country's GDP and employing over 600,000 people.

What can be regulated?

- The case law is yet to be fully developed on which workplace activities can be regulated under the corporations power. A constitutional challenge, if it eventuates, could provide useful clarification.
- For many decades, the High Court took a limited view of the activities that the corporations power could regulate. It was not until the *Concrete Pipes case* (1971) that the High Court declared that the corporations power was not to be 'approached in any narrow or pedantic manner' and that at the least it supported laws concerning the *trading* activities of trading, financial or foreign corporations.
- In *Re Dingjan* (1995) Chief Justice Mason reiterated his view that the Commonwealth's power to legislate with respect to corporations extends to any activity, not just for the purpose of 'trading' but for the corporation's business in general. But the majority of the High Court declined to follow Chief Justice Mason's lead, stating that to be a law 'with respect to' corporations under s. 51(20), legislation must *directly affect* or be '*connected to*' such bodies and not merely '*relate to*' their business or operations in some way.
- The Full Federal Court in *Quickenden* (2001) followed Justice Brennan's discrimination test from *Re Dingjan*, i.e., a law will be valid under s. 51(20) if it *confers rights or powers or imposes duties or liabilities peculiarly on such corporations or those who deal with them or engage in conduct affecting them*. Even using this narrower test the Full Federal Court held that the certified agreement provisions in the Workplace Relations Act were valid.
- The *Newcrest Case* decided in February 2005 by the New South Wales Industrial Relations Commission shows both the importance of the narrower tests in *Re Dingjan* and the complexity of building a unitary industrial relations system based on the corporations power.
- Academic commentators might speculate as to what the bottom line was from *Re Dingjan*, and what aspects of the *Workplace Relations Act* and the Work Choices legislation might therefore be valid. But speculation is all this will be until the High Court considers the Work Choices legislation and pronounces its judgment.

Trade and Commerce power – s. 51 (1)

- The trade and commerce power can be used to regulate commercial and related activities not only by *corporations* but also by *individuals, partnerships or other unincorporated bodies* — provided these activities occur across state or international boundaries. It cannot be used to regulate *intra-state* business.
- The High Court has rejected the argument that because *intra-state* commercial activity has an obvious economic connection with *inter-state* trade, it can be regulated by federal law as ‘incidental’ to the trade and commerce power. The Court has emphasised that there must be a *physical* and not merely *economic* connection between *intra-* and *inter-state* trade before commercial activity within a state can be regulated under s. 51(1).
- In the *Second Airlines Case* (1965), Justice Kitto said that the essentially federal nature of the Australian constitutional system placed a limit on the expansion of the trade and commerce power — and any other power in s. 51 — a limit that the Australian High Court was bound to uphold. Justice Windeyer, however, criticised such arguments as an echo of the ‘reserved powers doctrine’ (under which certain areas of lawmaking were ‘reserved’ for the States) which was abandoned by the High Court in the classic *Engineers Case* (1920).

External Affairs power – s. 51 (29)

- Under its general ‘executive power’ in s. 61 of the Constitution, the federal government can enter treaties and agreements with other countries without the prior approval of Parliament.
- High Court cases in the 1980s established that any treaty obligation entered into by the federal government could be enacted as domestic law under the external affairs power in s. 51 (29). In theory, therefore, the federal government can circumvent limitations on its legislative power in the industrial relations area by entering appropriate international treaties and agreements and then implementing them as domestic law.
- However it is not certain that the High Court will continue to support the sweeping use of the external affairs power to implement treaty obligations. The development of the *Tasmanian Dams* principle allowing the Commonwealth to implement any treaty obligation whatever the subject was contentious, supported by a bare majority in the critical cases, and with strong judicial dissent.
- As with the trade and commerce power, judicial criticism of the expansion of the external affairs power has focussed on the limits imposed by Australia’s federal system of government.

Taxation power – s. 51 (2)

- The Federal Government might be able to use the general nature of the taxation power to overcome the lack of a specific workplace relations power in the Constitution. The High Court has held that the Commonwealth can set whatever criteria it likes for the imposition of a tax.
- The Federal Government could require employers to adhere to its workplace relations policies if they wish to avoid additional tax, even if some of these policies are otherwise beyond its legislative power. The Commonwealth has already used the taxation power in this way in the workplace relations field by requiring employers to pay an additional levy if they do not contribute a certain amount to superannuation and training for their workers.
- The main obstacle to greater use of the taxation power for a unitary industrial relations system may be political.

Part Two – Obstacles and Limitations

- Apart from the restrictions on particular powers in the Constitution, other more general limitations on the Commonwealth's legislative capacity may hamper the creation of a single industrial relations system for Australia.

Division of legislative power

- One restriction on using the corporations power comes from the statutory interpretation principle *generalia specialibus non derogant* (where there is a conflict between general and specific provisions, the specific provisions prevail). In the *Bank Nationalisation Case* (1948) the High Court applied this principle to prevent the Commonwealth using the corporations power to overcome the specific restriction in s. 51 (13) — the 'banking power' — against federal regulation of State banks.
- However it is unclear whether the *generalia specialibus non derogant* principle applies in relation to the s. 51 (35) labour power. Powers such as s. 51 (35) containing broad limits but not express restrictions might not limit use of other powers in s. 51.
- In the *Concrete Pipes Case* it was held that the Commonwealth could use the s. 51(20) corporations power to stop businesses operating within one state making restrictive trade agreements, even though this would not be valid under the s. 51(1) trade and commerce power (which is limited to overseas and inter-state trade). In *Pidoto* (1943) Chief Justice Latham was adamant that the limitations on Commonwealth power in s. 51(35) did not limit any other power in s. 51.

- On the other hand, eminent constitutional lawyer Professor Leslie Zines suggests that the limitation in s. 51(10) — which allows the Commonwealth to make laws ‘with respect to ... fisheries in Australian waters *beyond territorial limits*’ — may restrict other legislative powers, such as the s. 51(29) external affairs power.

Survival of State governments

- The most obvious limitation in a federal system is the need to ensure the survival of state governments as effective governing bodies in their own right. As (then) Justice Dixon said in the *Melbourne Corporation case* (1947), ‘the foundation of the Constitution is the conception of a central government and a number of State governments separately organised. The Constitution predicates their continued existence as independent entities’.
- In *Re Australian Education Union* (1995) the High Court said that the protection for the states in the Constitution included a ‘prohibition against laws of general application which operate to destroy or curtail *the continued existence of the States or their capacity to function as governments*’.
- In the workplace relations area, this means Federal laws and awards can provide for the ‘wages and working conditions’ of ‘the vast majority’ of state public servants, but they cannot regulate eligibility, length or termination of employment, which must be covered by state law. And key managers and other critical state officials are outside federal regulation altogether.
- The ability of the Commonwealth to regulate the workplace relations of state government owned corporations may provide an important test case for the High Court. Under state legislation such corporations are subject to government direction and are accountable to the relevant State minister, and ultimately to the State parliament, for achievement of their corporate plans and financial targets.
- However current High Court authority suggests that any corporation — including State owned entities — will be a ‘trading or financial’ corporation for the purpose of federal regulation under s. 51 (20) of the Constitution if trading or financial activities are a substantial or significant part of its corporate activities.

Federalism, industrial relations and the corporations power

- Regulation of industrial relations has been at the heart of key High Court decisions on the nature of Australian federalism and the division of legislative power between the Commonwealth and the States.

- In the watershed *Engineers Case* (1920), the High Court held that industrial disputes involving State government instrumentalities were not cordoned off from the scope of the labour power in s. 51 (35) of the Constitution. In reaching this decision the High Court abandoned the ‘reserved powers’ doctrine followed since Federation, stating that the powers of the Commonwealth in the Constitution were to be given full effect in accordance with their ordinary and natural meaning, and without regard to whether they intruded on areas also within State law.
- The *Engineers Case* is cited by those who rule out any limit on Commonwealth power based on a concern to maintain State legislative authority. Nevertheless some members of the High Court have continued to express concern about the threat to Australia’s federal system of government from the unlimited expansion of Commonwealth power in s. 51 of the Constitution.
- Some commentators see the Howard Government’s plan for a unitary industrial relations system built on the corporations power as a fundamental challenge to federalism in Australia. In the words of Chief Justice Gibbs in the *Actors Equity Case*, the issue in the forthcoming High Court case will be how ‘to achieve the proper reconciliation between the apparent width of s. 51 (20) and the maintenance of the federal balance which the *Constitution* requires’.
- Concern for the federal balance might impose pressure not to go beyond the ‘discrimination test’ explained by Justice Brennan in *Re Dingjan* in relation to which workplace activities can be regulated by the Commonwealth under the corporations power.

Trade Unions and Commonwealth Regulation

- ‘Traditional’ Australian labour law based on the labour power in s. 51(35) of the Constitution allowed, perhaps even required, a central role for trade unions. Moving the constitutional basis of the federal industrial relations system to the corporations power gives trade unions a less central role. It also makes regulation of trade unions more complex. In some circumstances trade union activities may be beyond Commonwealth control.
- Actions by unions or others in the industrial relations area could only be protected by the implied freedom of political communication if they have a *political* and not merely *industrial* character.
- It is unlikely that a majority of the current High Court would agree that a separate constitutional right of association existed. Even if they did, it appears that as with the implied freedom of political communication, any such right could only restrict Commonwealth regulation of association for *political*, not *industrial* purposes.

Part Three – Other Issues

Estimated coverage of Australian workforce

- Precisely how much of the Australian workforce would be covered by the new federal workplace legislation is not clear. The complexity of Australia's industrial relations laws makes any definitive survey impracticable.
- Based on the broad estimates from the Government and others, however, a sizeable segment of the Australian workforce — somewhere between 10—25 per cent — would remain outside a federal industrial relations system centred on the corporations power.

Prospects for a High Court challenge

- The prospects for a High Court challenge to the Work Choices legislation will depend heavily on the Court's view of the scope of the corporations power in s. 51(20) of the Constitution. There is no previous definitive High Court case to guide the current High Court. And membership of the Court has changed completely since the last major case in 1995 on the scope of the corporations power.
- Commentators often describe the current High Court as 'conservative'. The proposal for a unitary industrial relations system — taking over state functions using a broad or 'liberal' interpretation of the corporations power — is *prima facie* inconsistent with a 'conservative' legal approach.
- In the *Incorporation Case* (1990) the High Court ruled 6:1 against an attempt by the Hawke Government to use the corporations power to enact a single national corporations law. At the very least this precedent must place a question mark over the Commonwealth's ability to use the corporations power to build a national industrial relations regime.

Conclusion

- While the weight of academic and other legal opinion generally seems to endorse extensive coverage of Australian workplace relations by the Work Choices regime based on the corporations power, the under-developed state of the law in this area means this is essentially speculation, however erudite it might be. Employers will need to factor in a real risk that it may be more than the edges of the Work Choices legislation that cause constitutional problems.
- As with the trade and commerce and external affairs powers, the prospect of an unlimited use of the corporations power raises major fears for federalism. In any High Court challenge, the States will need to develop a body of doctrine for constitutional interpretation of the corporations power in the industrial relations context 'which does not lapse into reserved powers thinking but which, nonetheless, takes account of the federal context in an acceptable and workable fashion'.

- There is a widespread view that the current regime of six different industrial relations systems is confusing and inefficient for a country of Australia's limited economic size. But there is also potential for the proposed Work Choices workplace system to be incomplete and multi-layered. This suggests that it might be in the interests of all parties to explore a more cooperative approach.

Introduction

This research brief examines the extent of the Commonwealth's power under the Australian Constitution to make laws establishing a single national industrial relations system. This is a central aim of the Workplace Relations Amendment (Work Choices) Bill 2005. The research brief is of course directly relevant to the Work Choices legislation. However, instead of focussing on provisions in that legislation, it seeks to give readers an understanding of the range of constitutional issues relevant to any attempt to create a national industrial relations regime. A forthcoming Bills Digest¹ prepared by the Parliamentary Library examines the Work Choices legislation in detail.

The Constitution, 'heads of power' and industrial relations

Analysis of the Australian Constitution is vital when assessing the lawfulness or validity of proposals for a unitary federal industrial relations regime. Fearful of an overly powerful central government, the drafters of the Constitution only gave the Commonwealth the ability to make laws on some 40 specific subjects or 'heads of power'.² To be valid, Commonwealth legislation must be sufficiently connected with or, in the words of the Constitution, be 'with respect to' one of these heads of power. The states, meanwhile, retain full or 'plenary' power to make laws on any subject, without being limited to particular topics.³ Where a state and the Commonwealth legislate on the same topic, however, the federal law prevails.⁴

The Constitution has been a major influence on Australia's industrial laws. As Professor Ron McCallum from the University of Sydney says, an understanding of the division of powers in the Constitution 'is essential in order to fully comprehend the operation of our federal and State labour laws'.⁵ The key issue in any proposal for a single federal workplace relations system is that the Constitution, as approved by the Australian people in the 1890s,⁶ did not give the Commonwealth power to make laws over 'industrial relations' or 'employment' generally. Instead, the Commonwealth was given limited power to make laws in this area: it was only allowed to legislate for the 'conciliation and arbitration' of 'interstate disputes' over 'industrial matters'.⁷

To build a national workplace relations system, the Commonwealth will have to use its power in the Constitution to make laws on other subjects. Commonwealth legislation about employment or workplace regulation will be valid if it can be described as a law about one of the other topics or heads of power in the Constitution, such as 'corporations', 'trade and commerce' or 'external affairs'. This is the approach taken in the Howard Government's current proposals. According to the Government, the Work Choices legislation is:

... largely based on the corporations power in the Constitution. In addition it will rely on other heads of power—the territories power (for the ACT and the NT), the referral power (for Victoria) and the external affairs power to support existing arrangements (e.g. the unlawful termination provisions).⁸

Under the Australian system of government, it is the role of the High Court to decide whether federal law such as the Work Choices legislation is properly based on one or more of these heads of power in the Constitution.

Regulation of industrial relations in Australia

Separate industrial relations systems are maintained by the Commonwealth and five of the six states. The federal industrial relations system operates in the ACT and the Northern Territory, as well as in Victoria, which 'referred' key industrial relations powers to the Commonwealth in 1996. The other states maintain their own systems, each with a tribunal or court similar to the federal Australian Industrial Relations Commission (AIRC).⁹ There is no clear demarcation between federal and state systems, and employers must often comply with more than one set of obligations. According to the Minister for Employment and Workplace Relations, Hon. Kevin Andrews MP:

... it is not one but six different systems and often conflicting sets of laws that regulate the employment and which duplicate and overlap with each other in a manner that often defies the wisdom of Solomon ... it is commonplace for businesses and their employees to have to grapple with obligations under state systems as well as those in federal awards and agreements.¹⁰

Some employees, for example, have most of their working conditions regulated by federal law, but are subject to state law on matters such as health and safety and public holidays.¹¹ According to industrial relations experts Breen Creighton and Andrew Stewart:

The inevitable consequence is that there is a constant tension between the various systems. Over the years all participants in the industrial process have exploited that tension when it has suited their industrial, legal, political or economic purposes to do so.¹²

The Federal Government has declared that a single industrial relations system is central to its next generation of workplace relations reform. In its information booklet [Work Choices](#), released in October 2005, the Federal Government said it was 'moving towards one, simpler national workplace relations system'.¹³ The Explanatory Memorandum to the Work Choices Bill stated that it will:

... simplify the complexity inherent in the existence of six workplace relation jurisdictions in Australia by creating a national workplace relations system based on the corporations power that will apply to a majority of Australia's employers and employees.¹⁴

When introducing the amending legislation into Parliament on 2 November 2005, Minister Andrews said:

We live in an integrated national economy and it makes no sense whatsoever to adopt anything other than a national approach to workplace relations. By using a combination of constitutional heads of power, WorkChoices will cover up to 85 per cent of employees across Australia.¹⁵

In April 2005, Prime Minister Howard said he preferred agreement between the Commonwealth and the states on a national scheme. As the industrial relations journal *workplace express* said, however, the Prime Minister also made it clear that the government would pursue a takeover of state systems if the Labor governments refused to cooperate.¹⁶

Options for a unitary system

Since Federation, there have been a number of attempts to remove Commonwealth–state duplication in industrial relations. In 1929, the Bruce Government sought to withdraw from this area in favour of the states, leading to the dissolution of parliament and the government’s defeat at the ensuing election.¹⁷ And no less than seven referenda have been held to change the industrial relations power in the Constitution—all of which failed.¹⁸

With reform by referendum unlikely, the Commonwealth is left with two options to gain greater control over industrial relations. The first is a voluntary referral of legislative power by the states under s. 51(37) of the Constitution. In 1996, Victoria referred legislative power over industrial relations to the Commonwealth.¹⁹ Minister Andrews believes that:

... it is not beyond the realm of possibility that in the years ahead an increasing number of states would decide to refer their remaining powers to the Commonwealth.²⁰

In a statement to parliament on workplace relations reform in May 2005, the Prime Minister said that the states would be invited to refer their industrial relations powers to the Commonwealth. As yet, however, there are few signs that other states will follow the example set by Victoria. New South Wales Minister for Industrial Relations John Della Bosca said:

... our State system is preferred by a margin of two-to-one at present ... the Commonwealth should respond by improving theirs, not closing ours.²¹

While resistance to the Federal Coalition’s plans from Labor state governments might be expected, there is also opposition from conservative state party leaders. *Workplace express* reported in April 2005 that, while then NSW Liberal leader John Brogden supported a transfer of industrial relations power, his counterparts in other states rejected the idea. New Western Australian Liberal leader Matt Birney said that it was ‘absolutely vital’ that business be given more than one industrial relations system to choose from:

If we only have one federal system and the Federal Government of the day is Labor, then you are kidding if you think they won’t hand over our industrial relations system to the union movement ...

If we continue to operate a dual system then a future State Liberal Government will no doubt provide a safety net for employers who would have been otherwise trapped by a Federal Labor Government union-based industrial relations system.²²

Queensland Opposition and National Party leader Lawrence Springborg said he was far from convinced about the need for a single, national industrial relations system:

Our concern is that if this model goes too far, it could completely derail the state industrial relations system, which could have very, very negative impact on the capacity of State Governments to be able to run their affairs, particularly on IR matters, of which they have a very significant and direct responsibility.²³

In addition, however, whether a referral of industrial relations powers would create a unitary industrial relations system depends on the terms of the referral from individual states. A long list of matters was excluded from Victoria's 1996 referral, including the 'number, identity, and appointment of employees in the public sector', as well as workers' compensation, superannuation, occupational health and safety, apprenticeships, long service leave, public holidays and equal opportunity.²⁴ If Victoria's approach were the model for referral by other states, this would leave a unitary federal system incomplete, with the different state systems still regulating some important workplace issues, and employees in particular sectors.

With a referral of power from the states appearing unlikely, given their current political makeup, the final option for the Federal Government is to use other powers in the Constitution—on top of the traditional labour power—to move towards a unitary industrial relations system. Prime Minister Howard said in May 2005 that if the states refused to refer their powers, the government would adopt this option, focussing on use of the corporations power in the Constitution.²⁵

Key Points

- The drafters of the Australian Constitution only gave the Commonwealth the ability to make laws on some 40 specific subjects or 'heads of power'. Commonwealth legislation must be sufficiently connected with or, in the words of the Constitution, be 'with respect to' one of these heads of power to be valid.
- The Commonwealth was given strictly limited authority over industrial relations: it was only allowed to make laws for the 'conciliation and arbitration' of 'interstate disputes' over 'industrial matters'.
- The Commonwealth and the States maintain six separate but overlapping industrial relations systems. There is no clear demarcation between federal and state systems, and employers must often comply with more than one set of obligations.
- Attempts to give the Commonwealth more industrial relations power in a number of referenda have been unsuccessful. Victoria 'referred' key industrial relations powers to the Commonwealth in 1996 but a similar referral from other States seems unlikely.
- The remaining option for creating a single federal industrial relations system is to use other 'heads of power' in the Constitution such as the corporations power.

Part One—Constitutional Powers

Labour power—s. 51(35)

The only specific power over industrial relations included in the Constitution is the conciliation and arbitration or ‘labour’ power in s. 51(35), which allows the Commonwealth to make laws with respect to:

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

Origins of the labour power

The origins of the conciliation and arbitration or ‘labour’ power lie in the great maritime, shearing and mining strikes in the Australasian colonies in the 1890s, many of which extended beyond one colony.²⁶ According to industrial relations law specialist Neil Gunningham, the labour power was inserted into the Constitution ‘with the specific intention of substituting a peaceful method of dispute settlement for strikes, lockouts and other forms of industrial action’.²⁷ As Creighton and Stewart note, however:

It is important to appreciate that most, if not all, of the ‘founding fathers’ of the Constitution considered that the conciliation and arbitration power would rarely if ever be used. There seems to have been an assumption that most industrial disputes would be dealt with at a State level, and that the normal method of resolving them would be through collective bargaining. Neither assumption proved well-founded.²⁸

Former New South Wales Industrial Commission Justice J. Macken notes that, at the final 1898 Constitutional Convention, there was a narrow vote in favour of giving the new federal parliament a strictly limited power to regulate *interstate* disputes. According to Justice Macken, delegates to the Constitutional Conventions in the 1890s saw the issue as a matter of principle — ‘should the Commonwealth Parliament have this power or should it be left exclusively to the States?’²⁹ Macken observes that:

Even the more radical or liberal of the framers of the Constitution were concerned to preserve the independence of the States within their own spheres. Had they been asked after the debate what they had done they would all have replied that they had conceded to the Commonwealth a very limited power to act in a limited class of industrial disputes and that plenary [i.e. full] power over industrial disputes still resided in the States where it rightfully belonged.³⁰

Limitations of the labour power

While the labour power has been the main instrument used for federal industrial relations laws, it gives the Commonwealth limited authority only.³¹ In essence, it allows machinery to be created for the prevention and settlement of certain types of dispute. But it does not permit the Commonwealth to legislate directly on central aspects of employment such as wages. As

Creighton and Stewart explain, 'at most it can attempt to persuade those who are charged with resolving interstate industrial disputes [for example, the AIRC or the proposed Fair Pay Commission] to adopt its preferred policy'.³²

Two other significant limitations have afflicted the labour power. One is the requirement for an 'industrial' dispute. Until the 1980s, the notion of 'industry' limited Commonwealth jurisdiction to matters involving manual labour or an 'industrial' process, which excluded 'large areas of white collar employment, as well as school, college and university teaching'.³³ It was not until 1983 that the High Court overturned this restrictive interpretation.³⁴ As Professor McCallum says:

In large part, this is why for the first 90 years of the twentieth century the Australian Parliament was content to share with the States the regulation of labour relations.³⁵

The other main limitation is the need for a dispute 'extending beyond the limits of any one State', that is, an *interstate* dispute. Issues involving workers in only one state are outside Commonwealth jurisdiction under the wording of s. 51(35). Creighton and Stewart say that the 'interstateness' requirement is particularly significant:

It means that the Commonwealth, even if it acts to the limits of its power under s. 51(35), must share legislative responsibility over labour relations with the States. The latter, unencumbered by similar constitutional restrictions, have shown little inclination to vacate the field, particularly since their legislation and systems of dispute resolution predated the Commonwealth system and overshadowed it for a significant part of the 20th century.³⁶

Various devices have been used to partly circumvent the need for an 'interstate' dispute, especially the creation of 'paper' disputes (rather than actual strikes or lock-outs) in the form of a log of claims served by a federally-registered union on employers in more than one state.³⁷

The above limitations restrict both the types of laws the Commonwealth can enact using the labour power, and the range of issues that federal bodies such as the AIRC or the proposed Fair Pay Commission can resolve.

The restrictions on the labour power have been alleviated to some extent by the High Court's broad interpretation of the Constitution's 'incidental' power in s. 51(39). This allows the Commonwealth to regulate matters with a 'sufficiently close connection' to a head of power. The High Court has said that issues such as the regulation of trade unions registered under the federal system, prohibition of certain types of union pressure, protected industrial action and certification of agreements all have a sufficient connection with the labour power.³⁸

According to former Chief Justice Sir Anthony Mason, the limitations on federal power in s. 51(35) mean that:

... we have a dual (federal and State) system of arbitration and that it has unnecessary complexity and technicality ... there is no justification for [this] in the world of industrial

relations where speed and simplicity of dispute resolution are, or should be, of the essence. There is much to be said for the view that the [Federal] Parliament should have power over industrial relations generally...³⁹

Creighton and Stewart agree, stating that the:

... relatively small size of the Australian economy, together with its high levels of integration and interdependence, suggest that industrial relations should be a matter of federal responsibility, as is the case in relation to most other fundamental features of economic activity.⁴⁰

Professor McCallum, however, argues that there is ‘much life left in the labour power’ which could be used to develop a cooperative national labour law system. He notes that in the *Industrial Relations Act Case* (1996),⁴¹ the High Court endorsed laws allowing enterprise bargaining between single employers and trade unions as a valid use of the labour power. Similarly, in the *Pacific Coal Case* (2000),⁴² the High Court upheld the Howard Government’s award simplification process through a ‘flexible and pragmatic reading of the labour power’.⁴³

Professor McCallum emphasises that despite its limitations, the focus of the labour power on securing industrial peace ‘has always meant that the terms and conditions of employment of employees are at its very heart’.⁴⁴ In a similar vein, Justice Kirby of the High Court—in a speech marking the centenary of the *Conciliation and Arbitration Act 1904*—noted the words of Justice Henry Bourne Higgins (responsible for the famous *Harvester* judgment⁴⁵ in 1907, entrenching the concept of a basic or minimum wage), who said the Act was:

... part of a system of legislation based upon the feeling that if human life is to be used for the purpose of profit it must not be used to its degradation ... [but to ensure that] ... the health and vitality of the community are not lowered.⁴⁶

Beyond the labour power

Before the 1990s, federal governments made little use of other powers in the Constitution to make laws on workplace relations, largely because of concern about encroaching on the authority of the states. But this sensitivity to states’ rights was abandoned with the Keating Government’s *Industrial Relations Reform Act 1993* and the Howard Government’s *Workplace Relations Act 1996*, both of which made use of alternative powers, especially those over corporations and external affairs.⁴⁷

While agreeing that use of other constitutional powers is the ‘only effective option’ for the creation of a national industrial relations system, Creighton and Stewart note that:

The problem is that, even if the political will can be found to confront the cynical and opportunistic States’ rights arguments (and costly High Court challenges) that the use of these powers tends to provoke, it is unclear whether the resulting system will be any less complex than the present mix of federal and State regulation.⁴⁸

Key Points

- The labour power in s. 51 (35) of the Constitution has been the main vehicle for federal regulation of industrial relations.
- But this power is strictly limited. It allows machinery to be created for the prevention and settlement of certain types of dispute, but does not allow the Commonwealth to legislate directly on central aspects of employment such as wages.
- The other main limitation is the need for a dispute ‘extending beyond the limits of any one State’, that is, an *interstate* dispute. Issues involving workers in only one state are outside Commonwealth jurisdiction under the wording of s. 51(35).
- These limitations restrict both the types of laws the Commonwealth can enact using the labour power, and the range of issues that federal bodies such as the AIRC or the proposed Fair Pay Commission can resolve.
- Before the 1990s, federal governments made little use of other powers in the Constitution to make laws on workplace relations, largely because of concern about encroaching on the authority of the states.
- But this sensitivity to states’ rights was abandoned with the Keating Government’s *Industrial Relations Reform Act 1993* and the Howard Government’s *Workplace Relations Act 1996*, both of which made use of alternative powers, especially those over corporations and external affairs.

There are various other heads of power in the Constitution that authorise the federal parliament to make laws on workplace relations. However, all of these are limited in some way, either in the individuals and entities they apply to, or in the range of workplace issues they can cover.

Corporations power—s. 51(20)

The centrepiece of the Howard Government’s plan to create a unitary industrial relations system is greater use of the ‘corporations power’ in section 51(20) of the Constitution. This provision allows the Commonwealth to ‘make laws ... with respect to:

... foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth.⁴⁹

In the current Workplace Relations Act, the corporations power underpins provisions relating to individual Australian Workplace Agreements (AWAs), collective certified agreements, unfair contracts, freedom of association and unfair dismissal.⁵⁰ The Work Choices legislation goes considerably further in this respect (see Bills Digest), with a wide range of employment and other provisions based on the corporations power.

A central issue for the High Court in any challenge to such provisions will be to what extent the *corporations* power authorises laws about *individuals*. Does the Commonwealth's power to make laws with respect to *corporations* allow it to regulate the working conditions of *people* merely because they work for a corporation or have dealings with a corporation in some other way?

A federal government discussion paper, issued in 2000 by former Minister for Industrial Relations Peter Reith, said that there were many benefits in a national system of workplace relations based primarily on the *corporations* power rather than the labour power. Unlike the labour power, the *corporations* power does not require an 'interstate' dispute to bring employers and employees into the system. Instead, employers and their employees would be in a 'corporations based federal system' of workplace regulation.⁵¹ According to the paper, this 'very simple change' would mean that:

... the devices associated with the current federal award system, including respoendency, ambit claims, roping-in of employers and paper disputes, would become redundant. The system could focus more on outcomes, and less on process. The gridlock of technicality and the legal fiction of manufactured paper disputes, a system barely comprehensible to the experts on the inside, could be done away with.⁵²

In contrast, Professor McCallum is concerned about use of the *corporations* power not merely as a *supplementary* mechanism to fill in gaps in the labour power, but as the *primary* basis for a national labour law system.⁵³ In his view, this will lead to the 'corporatisation' of Australian labour law 'to the detriment of flesh and blood persons who interact with corporations'.⁵⁴ He believes that 'wholesome labour laws' should seek to balance the 'rights, duties and obligations of employers and employees as equal legal actors' in the workplace. But, he says, national labour laws based on the *corporations* power:

... could not for long maintain this balance between employers and employees. In the fullness of time, these labour laws will become little more than a sub-set of *corporations* law because inevitably they will fasten upon the economic needs of *corporations* and their employees will be viewed as but one aspect of the productive process in our globalized economy.⁵⁵

There are two key questions in relation to use of the *corporations* power for a unitary national industrial relations system:

- who can be regulated—that is, which individuals and entities can be subject to Commonwealth workplace relations laws made under the *corporations* power?
- what can be regulated—that is, which industrial or workplace activities can be regulated by the Commonwealth under this power?

Who provides the answers?

As with all constitutional issues, the High Court is the final arbiter on such questions. However, in the case of the corporations power, the Court has been reluctant to provide definitive answers. With a national workplace relations system based on the corporations power, this means it may be difficult to determine in a particular case whether an employer or workplace activity comes under Commonwealth law.

Instead of providing definite criteria as to who and what falls within the corporations power, the High Court has preferred an incremental, case by case approach. In the *Concrete Pipes Case* (1971) Chief Justice Barwick said that:

We were also invited in the argument of these appeals to express some criteria by which a law may be held to be a law with respect to the topic of s. 51(xx). But such a submission in my opinion ... misconceives our function ...⁵⁶

As his successor Chief Justice Gibbs explained in the *Actors Equity Case* (1982):

... it is unnecessary, and undesirable, to attempt in the present case to define the outer limits of the power conferred by s. 51(xx). The method which the courts have followed in the past, of approaching the solution of the difficult problems presented by such a provision as s. 51(xx) gradually and with caution, proceeding no further at any time than the needs of the particular case require, is the most likely, in the end, to achieve the proper reconciliation between the apparent width of s. 51(xx) and the maintenance of the federal balance which the *Constitution* requires.⁵⁷

The uncertainty produced by this approach is compounded by the tendency of legislative drafters to use general 'constitutional' definitions to describe who and what a particular federal law applies to. For example, in its *WorkChoices* booklet, the Howard Government explains that:

WorkChoices will cover up to 85 per cent of employees across Australia, primarily ... those employed by *constitutional corporations*. *Constitutional corporations* are the financial, trading and foreign corporations covered by paragraph 51(xx) of the Constitution.⁵⁸

The Federal Government claims this approach will 'introduce a more precise test for determining whether a business falls within the federal workplace relations system'.⁵⁹ What it means, however, is that, to know whether federal law applies to their business, employers will need to measure their situation against High Court case law on the definition of 'foreign, trading and financial' corporations. In many cases, this may be straightforward. But in some cases, employers may require detailed legal advice before they have an answer.

The reliance on phrases such as 'constitutional corporation', together with the High Court's case by case approach to the scope of s. 51(20), mean that, in some instances, only a court will be able to decide whether employers and employees are subject to Commonwealth

regulation. As Chief Justice Barwick remarked in the *Football Club Case* (1979),⁶⁰ referring to similar use of the phrase ‘trading corporation’ in federal legislation:

It is no doubt convenient to the Parliament and the parliamentary draftsman to avoid the risk of the unconstitutionality of a statute by using statutory definitions expressed in terms of the relevant constitutional power ... *in the long run such a course may well prove highly inconvenient and costly to those affected by the statute. As in this case, the citizen may find himself litigating a constitutional question of some dimension ... it would be better if the Parliament and its draftsman assayed a definition ... which covered those described bodies which the Parliament wished to embrace within the operation of its legislation.*⁶¹

By stating that its national industrial relations laws will apply to ‘constitutional corporations’, the Federal Government is in practice transferring some of parliament’s law-making power to the High Court. Whether a particular entity is covered by these laws will not be determined by parliament at the time the legislation is enacted, but will be decided later by the courts, ultimately by the High Court. As Chief Justice Barwick explained:

... the Parliament, by using the constitutional language in its definition of ‘trading corporation’, has left it to this Court ... to determine the constitutional question whether the litigant comes within the constitutional power.⁶²

As the following sections explain, there have been divergent views within the High Court on the scope of the corporations power. Should this continue, the coverage of the Commonwealth’s new industrial relations legislation may fluctuate, expanding or contracting in accordance with the prevailing view of the majority of the High Court.

Who can be regulated?

Foreign, trading and financial corporations

Merely being a ‘corporation’ is not enough to allow an organisation to be controlled by federal law under s. 51(20) of the Constitution. Apart from *unincorporated* bodies—which includes many small businesses structured as sole traders or partnerships, as well as trusts and some community bodies, clubs, societies, trade unions and cooperatives—*incorporated* entities that are not ‘trading’, ‘financial’ or ‘foreign’ are also beyond the corporations power. The Federal Government’s 2000 discussion paper noted that:

Given the limitations of the underlying data sources, it has ... been assumed that all corporations fall within the scope of the Commonwealth’s corporation power.⁶³

However, this is not the case. As the paper itself said, ‘this will be true of the vast majority of corporations that are employers, but it will not be true of all of them.’⁶⁴ Indeed, the High Court has expended considerable time and energy debating which corporations fall within s. 51(20).

As constitutional law expert Professor George Williams notes, there has been little case law on the meaning of a ‘foreign’ corporation.⁶⁵ In the *Incorporation Case* (1990), the High Court made the obvious point that to be a ‘foreign’ corporation, a firm must be incorporated outside Australia.⁶⁶

In contrast, the High Court has carefully considered the criteria for a ‘trading’ or ‘financial’ corporation. In the *Football Club Case* (1979),⁶⁷ the High Court held 4:3 that a corporation will be a ‘trading’ corporation if trading is a *substantial or significant* part of its corporate activities, regardless of the purpose for which it was formed. As Chief Justice Barwick said:

... for constitutional purposes a corporation ... will satisfy the description ‘trading corporation’ if trading is a substantial corporate activity ... (O)nce it is found that trading is *a substantial and not a merely peripheral activity* ... the conclusion that the corporation is a trading corporation is open.⁶⁸

Chief Justice Barwick held that while the central activity of the West Perth Football Club and the Western Australian National Football League was the promotion of Australian Rules football, both the club and the league engaged in substantial trading activities—staging matches for profit, selling advertising and television rights and transferring players for a fee to other clubs—and so both were ‘trading corporations’ within the meaning of s. 51(20) of the Constitution.⁶⁹

In *State Superannuation Board of Victoria* (1982),⁷⁰ the High Court said in a 3:2 decision that it would take the same approach in deciding which bodies were ‘financial’ corporations. The Superannuation Board provided pensions to public sector employees, but also engaged in investment activities, including commercial and housing loans. The High Court said that ‘its business in this respect is very substantial and forms a significant part of its overall activities’.⁷¹ Therefore it was a ‘financial corporation’ under s. 51(20) and could be regulated by federal law.

The High Court noted that if a corporation was yet to begin business, or had barely started, the ‘substantial activity’ test could not be used. In that case, it might be necessary ‘to look to the purpose for which such a corporation was formed’ to decide whether it was a ‘trading’ or ‘financial’ corporation.⁷² This approach was adopted in *Fencott v Muller* (1983),⁷³ where the High Court held that a shelf company yet to engage in any business was a ‘financial corporation’ because its constitution showed that it was formed for a financial purpose.⁷⁴

The tests developed by the High Court for determining whether a body is a ‘trading’ or ‘financial’ corporation and therefore within federal power are commonsense—that is, the ‘substantial activity’ test for corporations that are up and running, and the ‘purpose’ test for entities yet to do much business. Nevertheless, many bodies may need legal advice to know whether they come within these terms and are subject to federal law. For some, there may be no clear answer, with the issue only able to be resolved before a court of law. As Justice Mason said about the ‘substantial activity’ test in the *Football Club Case*, it is ‘*very much a*

matter of fact and degree’ as to whether a body engages in enough trading or financial activity to bring it within federal control under the corporations power.⁷⁵

Moreover, these tests are not set in stone. The ‘substantial activity’ test was opposed by a significant minority in both the *Football Club Case* and the *Superannuation Board Case*. The minority favoured the ‘purpose test’—looking at the objects of an incorporated body as stated in its constitution—where a corporation was already trading as well as where it was yet to begin commercial activity. In the *Football Club Case*, for example, Justice Stephen noted that the income which the West Perth Football Club derived from its trading activities was ‘only as a means of better promoting its predominant purpose, the fostering of football’.⁷⁶ The subordination of its trading activities to its prime purpose of promoting football ‘reveals the very nature of the Club to be other than that of a trading corporation’.⁷⁷

If the High Court overruled its current position and accepted the ‘prime purpose’ test as the general measure of whether an organisation was within the corporations power, any federal law based on this power may not be applicable to a corporation with a non-financial or non-trading purpose in its constitution. With such a test, a larger number of Australian incorporated entities may be outside the definition of a ‘constitutional corporation’. Their employees would therefore be beyond the scope of Commonwealth workplace relations regulation under the corporations power.⁷⁸

Unincorporated firms

A 1997 survey by the Australian Bureau of Statistics estimated that approximately 26 per cent of workers in the private sector were employed by small to medium businesses that were not incorporated, and instead operated as sole traders or partnerships.⁷⁹ An unincorporated business cannot—by definition—be regulated using the corporations power. As Creighton and Stewart note:

Ironically, therefore, it is the small business sector, considered so politically and economically vital by the Howard Government, that would most likely be excluded from the regulatory framework it has proposed constructing ...⁸⁰

Workers in some unincorporated businesses can be validly regulated by Commonwealth law under other heads of power in the Constitution, including businesses in the ACT and the Northern Territory,⁸¹ as well those covered by Victoria’s referral of industrial relations power.

Not-for-profit sector

The area where there may be most doubt about whether federal industrial relations law applies is Australia’s large ‘not-for-profit’ sector. In March 2005, the Australian business journal *BRW* claimed that the ‘not-for-profit’ sector in Australia was worth \$70 billion per year, accounting for almost 10 per cent of the country’s GDP and employing over 600,000 people.⁸² As *BRW* noted, estimates of the value of the sector from the Australian Taxation

Office (ATO) are lower but still significant. In May 2004, Jennie Granger, Second Commissioner ATO, said:

There are 700 000 non-profit organisations, but only 170 000 of them are in the tax system—94 per cent of these are companies, and the remainder trusts. The combined annual turnover of non-profit organisations in Australia exceeds \$27 billion. The 30 000 largest non-profit organisations employ 8 per cent of Australia's workforce.⁸³

Some of these non-profit bodies, such as trusts, are not incorporated entities and cannot be regulated using the corporations power.⁸⁴ Other organisations in the not-for-profit sector that are incorporated will not be 'trading' or 'financial' corporations. For example, the large number of non-profit organisations referred to by the ATO (higher than *BRW's* estimate of the number of employees in the sector) may indicate a significant proportion of dormant corporations. If they conduct no real business, the High Court would apply the 'purpose' test. Provided their constitutions contain a legitimate non-profit object, they will not be classed as trading or financial corporations and will be beyond the scope of the corporations power.

Incorporated associations legislation

Each state and territory has legislation to allow organisations carrying on business to incorporate and register as non-profit bodies. Such organisations range from sporting clubs to charities, churches and aid bodies. Incorporation protects members of such bodies against personal legal liability.

In the context of the Federal Government's proposals for a 'unitary' industrial relations system, it is important to note that, except in the Northern Territory, 'trading' and 'financial' bodies are not eligible to incorporate under such legislation. For example, an entity cannot be incorporated under the New South Wales *Associations Incorporation Act 1984* if it has the primary purpose of 'trading or securing pecuniary gain for its members'.⁸⁵ A body is still eligible for incorporation if it has some trading or financial activities, provided these are not 'substantial' and are ancillary to its main non-profit purpose.⁸⁶ This is the reverse of the High Court's criteria for a s. 51(20) corporation. In other words, a body that can register as an incorporated association in New South Wales *prima facie* cannot be a 'trading' or 'financial' corporation as defined by the High Court for the purpose of s. 51(20).

Except for the Northern Territory, the other Australian jurisdictions have similar legislation.⁸⁷ So any organisation validly registered under these laws—that is, one formed for non-trading or non-financial purposes and which does not engage in substantial trading or financial activity—appears to be beyond the High Court's definition of a 'trading' or 'financial' corporation and outside the reach of federal law using the corporations power.⁸⁸

The following table shows the number of non-profit organisations incorporated under state and territory legislation (excluding the Northern Territory):

Bodies registered under Associations Incorporation Acts⁸⁹

<i>State/Territory</i>	<i>No. of incorporated associations</i>
NSW	> 30 000
VIC*	c. 30 000
QLD	c. 20 000
WA	> 18 000
SA	17 573
TAS	c. 3,500
ACT*	2 418
Total	c. 121 491

*covered by Commonwealth industrial relations law⁹⁰

Key Points

- The centrepiece of the Howard Government’s plan to create a unitary industrial relations system in its Work Choices legislation is to make greater use of the ‘corporations power’ in section 51(20) of the Constitution.
- The High Court is the final arbiter on the scope of the corporations power. Instead of providing definite criteria as to who and what falls within the corporations power, the High Court has preferred an incremental, case by case approach. This means it may be difficult to determine whether a particular employer or workplace activity comes under Commonwealth law.
- The High Court has yet to provide a definitive judgment on who or what can be regulated by Commonwealth workplace relations laws made under the corporations power. A central issue for the High Court will be to what extent the *corporations* power authorises laws about *individuals*. Does the Commonwealth’s power to make laws with respect to *corporations* allow it to regulate the working conditions of *people* merely because they work for a corporation or have dealings with a corporation in some other way?

- The tests developed by the High Court for determining whether a body is a ‘trading’ or ‘financial’ corporation and therefore within federal power under s. 51 (20) are commonsense. Nevertheless many bodies may need legal advice to know whether they come within these terms and are subject to federal law.
- Moreover these tests are not set in stone. If the High Court overruled its current position and accepted a ‘prime purpose’ test, a larger number of Australian incorporated entities may be outside the definition of a ‘constitutional corporation’. Their employees would therefore be beyond the scope of Commonwealth workplace relations regulation under the corporations power.
- The area where there may be most doubt about whether federal industrial relations law applies is Australia’s large ‘not-for-profit’ sector. In March 2005 the Australian business journal *BRW* claimed that the ‘not-for-profit’ sector in Australia was worth \$70 billion per year, accounting for almost 10 per cent of the country’s GDP and employing over 600,000 people.

What can be regulated?

The case law on which workplace activities can be regulated under the corporations power is yet to be fully developed. As Professor Stewart says, ‘there has never really been a definitive High Court case on its scope’.⁹¹ A constitutional challenge, if it eventuates, could provide useful clarification. Ironically, on this issue the Howard Government may need to seek support from judgments of some of the more ‘liberal’ members of the High Court.

For many decades, the High Court took a limited view of the activities that the corporations power could regulate. The leading case was *Huddart Parker* (1909),⁹² in which the High Court restricted the application of section 51(20) to intrinsically corporate activities such as payment of capital and returns, securities, auditing etc. Reflecting the ‘reserved state powers’ doctrine then in force—which said that grants of power to the Commonwealth were to be interpreted so they did not encroach on traditional state powers—the High Court was ‘clearly concerned that, once unleashed, a broad interpretation of s. 51(20) would be impossible to control’.⁹³

It was not until the *Concrete Pipes case* (1971)⁹⁴ that the High Court overruled the *Huddart Parker* view of s. 51(20), declaring that the corporations power was not to be ‘approached in any narrow or pedantic manner’ and that at the least it supported laws concerning the *trading* activities of trading, financial or foreign corporations.⁹⁵

In the *Actors Equity Case* (1982),⁹⁶ two members of the High Court expressed a much broader view of the operation of the corporations power. In a prelude to his later judgment as Chief Justice in *Re Dingjan* (see below), Justice Mason said the Commonwealth’s full or ‘plenary’ legislative power over corporations allowed it to regulate more than ‘the trading

activities of trading corporations or the financial activities of financial corporations'.⁹⁷ Instead, he said:

... it was intended to confer comprehensive power with respect to the subject matter so as to ensure that *all conceivable matters of national concern* would be comprehended.⁹⁸

Justice Murphy agreed that s. 51(20) enabled the Commonwealth to regulate *any activity* by a foreign, trading or financial corporation, suggesting that the corporations power:

... extends to laws dealing with industrial relations so that in relation to such corporations Parliament, uninhibited by limitations expressed in [s. 51(35), the conciliation and arbitration or 'labour' power], *may legislate directly about the wages and conditions of employees and other industrial matters*.⁹⁹

Unfortunately for those advocating use of the corporations power to extend federal industrial relations control, these statements were not directly relevant to the outcome of the case and are not seen as authoritative.

Importantly, however, the *Actors Equity Case* established that s. 51(20) supports legislation *protecting* as well as regulating foreign, trading and financial corporations.¹⁰⁰ In that case, the High Court upheld s. 45D of the *Trade Practices Act 1974*, which protects corporations against 'secondary boycotts' by trade unions. Under the corporations power, the Commonwealth can control activities, including industrial action by trade unions, which interrupt supplies to a corporation or in some other way hinder or prevent their trading activities.¹⁰¹

As Professor Williams points out, the next major High Court case on the scope of the corporations power—the *Tasmanian Dams Case* (1983)¹⁰²—'proved inconclusive on the question of whether all of the activities of a s. 51(20) corporation can be regulated'.¹⁰³ The majority of the Court only went as far as endorsing the (rather confusing) proposition that s. 51(20) authorises the regulation of activities '*undertaken for the purpose*' of a corporation's trading activities. And as Professor Williams notes, 'the decision did not resolve the degree of connection needed before an activity becomes one "for the purpose of" trading'.¹⁰⁴

In *Re Dingjan; Ex parte Wagner* (1995),¹⁰⁵ Chief Justice Mason reiterated his view from the *Actors Equity Case* that the Commonwealth's power to legislate with respect to corporations extends to any activity, not just for the purpose of 'trading' but for the corporation's business in general. The corporations power, he said:

... must be construed as a plenary power with respect to the categories of corporations mentioned in s. 51(xx) of the Constitution. On this view, the power is not limited to the regulation of the functions, activities and relationships of constitutional corporations ... (It) extends to the enactment of laws dealing with *activities undertaken for the purposes of the business of a constitutional corporation*.¹⁰⁶

Re Dingjan concerned a 1992 amendment to the *Industrial Relations Act 1988* (the forerunner of the current Workplace Relations Act) which allowed the AIRC to set aside or vary unfair agreements imposed on independent contractors if they ‘related to the business’ of a corporation.¹⁰⁷ Mr and Mrs Wagner supplied timber for the woodchip mill run by Tasmanian Pulp and Forest Holdings Ltd. The Wagners had sub-contracts with Mr and Mrs Dingjan and Mr and Mrs Ryan. The Dingjans and Ryans were unhappy with their agreements with the Wagners. Since their sub-contracts ‘related to the business’ of a corporation—that is, the forestry company—they argued that the AIRC could set them aside.

Once again, however, the majority of the High Court¹⁰⁸ declined to follow Chief Justice Mason’s lead. In a 4:3 decision, the Court said the Commonwealth could not validly make a law allowing the AIRC to review any contract or agreement ‘related to the business’ of a corporation. The majority emphasised that to be a law ‘with respect to’ corporations under s. 51(20), legislation must *directly affect* or be ‘connected to’ such bodies, and not merely ‘relate to’ their business or operations in some way. As Justice McHugh explained:

Where a law purports to be ‘with respect to’ a s.51(xx) corporation, it is difficult to see how it can have any connection with such a corporation unless, in its legal or practical operation, it *has significance* for the corporation. That means that it must have *some significance for the activities, functions, relationships or business* of the corporation.¹⁰⁹

Justice McHugh said it was not enough that a law ‘merely refers to or operates upon’ a s. 51(20) corporation.¹¹⁰ As Professor Stewart notes:

... the Commonwealth may not, in other words, simply use a reference to a ‘corporation’ as a ‘peg’ on which to hang any kind of law.¹¹¹

Professor Williams points out that in the industrial relations context, this may mean, for example, that:

... the Commonwealth could not enact safety standards for bicycle couriers simply because many of their deliveries are made to s. 51(xx) corporations. Equally, the Commonwealth could not use the corporations power to set maximum working hours for professionals employed in law or accounting partnerships on the basis that much of their work is performed for corporate clients.¹¹²

Beyond this, however, *Re Dingjan* does not offer much guidance on the range of employment and workplace matters that could be covered in a federal industrial relations system built on the corporations power. Nevertheless, the case has been used to bolster arguments both for and against a national workplace relations scheme.

Creighton and Stewart assess that in *Re Dingjan* ‘at least four judges had expressed broad views as to the scope’ of the corporations power, counting the judgment of Justice McHugh in the majority as one of these, along with the dissenting judgments of Chief Justice Mason and Justices Deane and Gaudron.¹¹³ Professor Williams also states that ‘it is arguable that in *Re Dingjan* the wider view of section 51 (20) prevailed’.¹¹⁴ According to Creighton and

Stewart, ‘the tenor of the judgments in *Dingjan*’ suggests that current provisions in the Workplace Relations Act, including those allowing ‘constitutional corporations’ to enter certified agreements or Australian Workplace Agreements (AWAs), and provisions relating to unfair contracts, victimisation and unfair dismissal:

... each of which concerns matters directly connected to a corporation’s activities, would indeed be upheld by the High Court in the event of any constitutional challenge.¹¹⁵

Professor Stewart suggests that if the key test is that of Justice McHugh—that is, whether legislation has *some significance* for the activities, functions, relationships or business of the corporation—then the corporations power would support federal laws providing for:

- the conciliation and arbitration of industrial disputes involving corporations
- employment conditions for corporations as stipulated by tribunals or indeed by the legislation itself
- the certification of individual or collective agreements to which a corporation was a party, and
- the regulation of matters incidental to any of the above, such as bargaining tactics (including industrial action), victimisation of various kinds and (possibly) registration of unions and employer associations.¹¹⁶

Professor Stewart argues that this interpretation is supported by two decisions by single judges in the Federal Court—*Rowe* (1998)¹¹⁷ and *Quickenden* (1999)¹¹⁸—which upheld use of the corporations power to underpin provisions in the Workplace Relations Act concerning freedom of association, victimisation, and certification of agreements. He says that in both cases, the Federal Court applied the ‘activities, functions, relationships or business’ test, on the basis that this represented the view of a majority of the High Court in *Re Dingjan*.¹¹⁹

Professor Stewart is also careful, however, to note the narrower view of the corporations power expressed by other majority judges in *Re Dingjan*.¹²⁰ Justice Brennan applied the *discrimination test*, that is, the law must have *some particular effect* on corporations different to its effect on other persons and entities:

To attract the support of s. 51(20), it is not enough that the law applies to constitutional corporations and to other persons indifferently. To attract that support, the law *must discriminate between constitutional corporations and other persons* ... A validating connection between a law and section 51(20) may consist in the *differential operation* which the law has on constitutional corporations albeit the law imposes duties or prescribes conduct to be performed or observed by others.¹²¹

Justice Toohey said that to be valid under s. 51(20), a federal law must affect ‘the rights, duties, powers or privileges of corporations’ in a way that evidences a *substantial and ‘not merely tenuous’* connection between the law and the corporations.¹²² Moreover, Justice

Dawson agreed with the view of Chief Justice Gibbs in the *Actors Equity Case* that, to be a valid use of the corporations power in s. 51(20), the law must focus on the trading, financial or foreign character of a corporation.¹²³

Significantly, these narrower views of the scope of the corporations power expressed by majority judges in *Re Dingjan* have also been applied in subsequent cases. Notably, in the appeal to the Full Federal Court in *Quickenden* (2001),¹²⁴ the Full Court was not prepared to endorse the broader view of the corporations power as the outcome of *Re Dingjan*. Instead it felt obliged to measure the legislation at issue—the certified agreement provisions in Part VIB of the Workplace Relations Act—against Justice Brennan’s narrower *discrimination test*:

... the state of the law after *Dingjan* supports, as a valid exercise of the corporations power, a law that applies expressly and specifically to constitutional corporations in their capacity as such corporations or to other persons or bodies in their dealings with such corporations or their dealings with them. A fortiori a law is a valid exercise of the power under s. 51(20) if it *confers rights or powers or imposes duties or liabilities peculiarly on such corporations or those who deal with them or engage in conduct affecting them* in connection with those dealings or that conduct. It may be accepted that *a law of general application which happens to apply to constitutional corporations among others is not a law with respect to such corporations for the purposes of s. 51(20)*.¹²⁵

It is important to note, however, that, even using this narrower test, the Full Federal Court held that the certified agreement provisions in the federal legislation were valid:

... the impugned laws apply directly to constitutional corporations in that character and to their employees. If satisfaction of a discrimination test as enunciated by Brennan J can be regarded as at least sufficient to determine validity then these laws are valid on that basis.¹²⁶

A recent case, decided in February 2005 by the New South Wales Industrial Relations Commission (IRC), shows both the importance of the narrower tests in *Re Dingjan* and the complexity of building a unitary industrial relations system based on the corporations power. Unlike the federal AIRC, state industrial commissions such as the NSW IRC can function as courts. In *CFMEU v Newcrest Mining Limited*,¹²⁷ the NSW IRC, operating as a court, considered the validity of Part VID of the federal Workplace Relations Act, which provides for the making of AWAs between corporations, such as Newcrest, and their employees. Newcrest argued that the NSW IRC could not use its power under state legislation to resolve disputes involving workers employed under federal AWAs. The company cited section 170VQ(4) of the Workplace Relations Act, which states that:

During its period of operation, an AWA operates to the exclusion of any State award or State agreement that would otherwise apply to the employee’s employment.

The NSW IRC said that this provision appeared to be a valid Commonwealth law, supported by the corporations power, because:

... it may be said it *protects in a direct way the 'activities, functions, relationships or business'* of the corporation which is a party to the AWA.¹²⁸

So, for the duration of an AWA, the AWA would validly exclude the operation of any award or agreement made under state law that might otherwise apply.

Importantly, however, the NSW IRC emphasised that federal legislation such as s. 170VQ(4) could not prevent it from making a state award in the first place. If, for example, a union notified it of the existence of an industrial dispute, the NSW IRC might decide to make a 'common rule' award (applying to a particular industry in the state generally) to settle the dispute. Once the federal AWA had expired, the employer corporation and the employee would be subject to the state 'common rule' award.

As the NSW IRC said, the corporations power in the Constitution does not allow the federal government to stop a state industrial body from performing its legislated functions:

The corporations power is not a power that authorises laws the effect of which would be to extinguish the power of a State Industrial Authority to make common rule awards or exercise its conciliation and arbitration powers to resolve an industrial dispute merely because of the existence of AWAs. Such a law would not have the requisite connection to the corporation in the manner required by McHugh or Toohey JJ in *Dingjan* nor meet the 'discriminatory operation' test of Brennan J in that case.¹²⁹

In the *Industrial Relations Act Case* (1996),¹³⁰ the High Court considered a challenge by a number of states to Keating Government legislation allowing the AIRC to approve 'enterprise flexibility agreements' negotiated by 'constitutional corporations' and their employees. However, during the case Western Australia conceded that the Commonwealth Parliament had 'power to legislate as to the industrial rights and obligations of constitutional corporations ... and their employees', so the High Court did not have to decide the issue.¹³¹ As Creighton and Stewart state, this means that:

It is not yet settled beyond all doubt that the Commonwealth can ... empower a trading corporation to enter into statutorily enforceable agreements with unions or its workers, merely because of its status as a trading corporation.¹³²

As Professor Williams notes, therefore, while the *Industrial Relations Act Case* confirmed the corporations power as 'an important tool in the development of any federal regime of labour market regulation', it 'added little to the interpretation of s. 51(20)'.¹³³

How far does the corporations power go?

As the above discussion indicates, the time is more than ripe for a definitive High Court decision on the scope of the corporations power in s. 51(20) of the Constitution. Both sides in the forthcoming High Court challenge on the Work Choices legislation—the Federal Government on the one hand, and the states and unions on the other—are hoping the High Court will decide the matter once and for all in their favour. Whether they get a definitive

answer, however, is another matter. The High Court may recognise the historic significance of the Work Choices case and set down guiding principles for the type of laws in the workplace relations area that would be allowable under the corporations power. Or it might adopt the 'incremental' approach advocated by former Chief Justices Barwick and Gibbs, merely offering narrow answers to the specific questions put before it.

Certainly the current state of High Court authority amounts to far less than a definite guide or measuring stick as to who and what can legitimately be covered by Commonwealth industrial relations laws based on the corporations power. The 'substantial activity' test for determining 'trading' or 'financial' corporations seems a commonsense one, but even this was opposed by significant minorities in key cases. While it may be unlikely, it is open to the High Court to adopt the alternative 'purpose' test, or some other yardstick, for deciding which entities are covered by the corporations power. This could significantly reduce the coverage of the Federal Government's proposed 'national' industrial relations system.

The key issue in relation to the corporations power, however, is which workplace activities it allows the Commonwealth to regulate. The main High Court cases to date hardly provide clear practical guidance in this respect for those seeking to rely on the new federal legislation. In this area, the High Court could choose from a wide variety of competing judicial theories or develop its own new approach. Academic commentators might speculate as to what the bottom line was from the last major case on this subject, *Re Dingjan*, and what aspects of the *Workplace Relations Act* and the Work Choices legislation might therefore be valid. But speculation is all this will be until the High Court considers the Work Choices legislation and pronounces its judgment.

At one end of the scale, the High Court could agree with former Chief Justice Mason and Justice Murphy that the corporations power is a 'plenary' or 'full' power, so that, provided legislation is 'with respect to' a s. 51(20) corporation, any workplace activity can validly be regulated. As Justice Murphy suggested, this would allow the Commonwealth to 'legislate directly about the wages and conditions of employees and other industrial matters'. Short of this, other options for testing workplace laws made under the corporations power include whether the legislation 'regulates activities undertaken for the purpose of a corporation's trading activities'; has 'some significance for the activities, functions, relationships or business of a corporation'; or 'confers rights or powers or imposes duties or liabilities peculiarly on such corporations or those who deal with them or engage in conduct affecting them'. All of these tests suggest that the range of employment and workplace activities able to be regulated under the corporations power might be extensive, but none provide any clear indication as to where the boundary might be.

In a recent paper, Rosemary Owens, an industrial relations legal expert from the University of Adelaide, said that 'in the light of the debate over the scope of the corporations power only a return to general principles will be of assistance in determining the validity of the 2005 Bill'.¹³⁴ Ms Owens then sets out the 'well-settled' principles of constitutional interpretation as laid down by the High Court in the *Grain Pool Case* (2000).¹³⁵ In other words, notwithstanding *Re Dingjan*, the *Industrial Relations Case*, *Concrete Pipes*, *Actors Equity*

and other judgments in this area, in the forthcoming case on the Work Choices legislation, the High Court will need to start at square one—that is, return to basic principles about interpreting the language of the Constitution—to determine whether provisions in the Bill are valid under the corporations power.

Key points

- The case law is yet to be fully developed on which workplace activities can be regulated under the corporations power. A constitutional challenge, if it eventuates, could provide useful clarification.
- For many decades, the High Court took a limited view of the activities that the corporations power could regulate. It was not until the *Concrete Pipes case* (1971) that the High Court declared that the corporations power was not to be ‘approached in any narrow or pedantic manner’ and that at the least it supported laws concerning the *trading* activities of trading, financial or foreign corporations.
- In *Re Dingjan* (1995) Chief Justice Mason reiterated his view that the Commonwealth’s power to legislate with respect to corporations extends to any activity, not just for the purpose of ‘trading’ but for the corporation’s business in general. But the majority of the High Court declined to follow Chief Justice Mason’s lead, stating that to be a law ‘with respect to’ corporations under s. 51(20), legislation must *directly affect* or be ‘*connected to*’ such bodies and not merely ‘*relate to*’ their business or operations in some way.
- The Full Federal Court in *Quickenden* (2001) followed Justice Brennan’s discrimination test from *Re Dingjan*, i.e., a law will be valid under s. 51(20) if it *confers rights or powers or imposes duties or liabilities peculiarly on such corporations or those who deal with them or engage in conduct affecting them*. Even using this narrower test the Full Federal Court held that the certified agreement provisions in the Workplace Relations Act were valid.
- The *Newcrest Case* decided in February 2005 by the New South Wales Industrial Relations Commission shows both the importance of the narrower tests in *Re Dingjan* and the complexity of building a unitary industrial relations system based on the corporations power.
- Academic commentators might speculate as to what the bottom line was from *Re Dingjan*, and what aspects of the *Workplace Relations Act* and the Work Choices legislation might therefore be valid. But speculation is all this will be until the High Court considers the Work Choices legislation and pronounces its judgment.

Trade and commerce power—s. 51(1)

Under s. 51(1) of the Constitution, the Commonwealth can make laws ‘with respect to ... trade and commerce with other countries and among the States’. As with the s. 51(35) labour power, the scope of the s. 51(1) trade and commerce power is considerably expanded by the Commonwealth’s ability under s. 51(39) to make laws ‘incidental to’ or ‘sufficiently connected with’ trade or commerce. In *Huddart Parker Ltd* (1931),¹³⁶ the High Court held that the trade and commerce power authorised federal industrial relations laws about stevedoring for ships engaged in interstate and overseas trade. Even though the legislation did not regulate ‘trade and commerce’, it was ‘sufficiently connected’ with this topic to come within s. 51(1).¹³⁷ In practice, this means that under the trade and commerce power, the Commonwealth can ‘regulate employment conditions and labour relations at or affecting any firms engaged in inter-state or overseas trade’.¹³⁸ As the Federal Government explains, for example, its new Work Choices industrial relations regime will cover ‘waterside, maritime and flight crew employers’.¹³⁹

The trade and commerce power can be used to regulate commercial and related activities not only by *corporations* but also by *individuals, partnerships or other unincorporated bodies*—provided these activities occur across state or international boundaries. However, a key limitation of the trade and commerce power is that it cannot be used to regulate *intra-state* business. As Professor Williams points out, s. 51(1):

... makes no mention of trade and commerce *within* a State ... it appears the latter was consciously withheld from the Commonwealth, and most judges have been careful to avoid an interpretation of s. 51(1) that would allow the Commonwealth to move into this field.¹⁴⁰

As Creighton and Stewart note, this restricts any contribution that the trade and commerce power could make to a national industrial relations system based on the s. 51(20) corporations power:

What s. 51(1) cannot do is to reach employers engaged only in intrastate trade, *many of whom are likely to be the very businesses who would also fall outside the scope of the corporations power*. Accordingly, the use of s. 51(1) can add little in practice to the reach of a regulatory system founded primarily on s. 51(20).¹⁴¹

Importantly, the High Court has rejected the argument that because *intra-state* commercial activity has an obvious economic impact on or connection with *inter-state* trade, it can be regulated by federal law as ‘incidental’ to the trade and commerce power. The Court has emphasised that there must be a *physical* and not merely *economic* connection between *intra-* and *inter-state* trade before commercial activity within a state can be regulated under s. 51(1).¹⁴² In the *Second Airlines Case* (1965),¹⁴³ the High Court said that the Commonwealth could regulate *air services within a state* because *intra-state* and *inter-state* air traffic physically shared the same airspace, and there would be chaos if they were controlled by different federal and state bodies.¹⁴⁴ As Chief Justice Barwick said:

The Commonwealth has power, as a safety measure securing the safety of the air for inter-State and foreign commerce to prohibit the use of aircraft in the course of regular public transport operations within Australia, including such operations wholly within any State ...¹⁴⁵

In contrast, the Commonwealth had no power to ‘*authorise the inception or carrying on of an intra-State airline*’.¹⁴⁶ The High Court rejected the Commonwealth’s argument that it could regulate this area under the trade and commerce power because inter-state and intra-state air services formed one economic market.¹⁴⁷ As the Chief Justice said:

Nor does the fact that inter-State air navigation profits by or to a significant extent depends upon the existence of intra-State air navigation warrant the conclusion that in fostering inter-State and foreign trade, the Commonwealth may stimulate and encourage intra-State trade. Consequently, [the federal law in question] ... derives no support from ss. 51(1) ... In my opinion in its purported operation in respect of intra-State commercial air operation it is invalid.¹⁴⁸

As Creighton and Stewart note, this limitation on the trade and commerce power is in marked contrast to the situation in the United States. The US Supreme Court has accepted that the equivalent ‘commerce’ power in the US Constitution enables the US Congress to regulate business within a state because of the economic link with the national economy. In turn this allows, for example, the *National Labor Relations Act 1935* (US) to cover all private sector employers in the United States.¹⁴⁹

Professor Williams notes that the narrow construction of the incidental aspect of the Australian trade and commerce power ‘is reflected in the limited, and generally secondary or supportive, use of s. 51(1) in the Workplace Relations Act.’¹⁵⁰ He argues that a broader interpretation of the trade and commerce power ‘would provide a significant new foundation for Commonwealth intervention in the field of industrial relations’.¹⁵¹ In his view, the modern High Court might not maintain the narrow construction of s. 51(1):

The Court has not considered the scope of s. 51(i) since 1976, and it may now be prepared to grant a wider operation to the power that does not rest upon a strict distinction between intra and interstate trade and commerce.¹⁵²

As Professor Williams points out, however, any such expansion of the trade and commerce power will not go as far as in the United States ‘because of important differences in the powers granted to the Australian Parliament and the United States Congress’.¹⁵³ As he notes, the Commonwealth Parliament is given legislative power over 40 different topics in s. 51 of the Australian Constitution, whereas the corresponding list in the US Constitution has only 18 items. This means, for example, that the Australian Parliament has specific powers over subjects such as ‘banking’ and ‘insurance’—and, it might be noted, ‘conciliation and arbitration’—for which in the United States the Supreme Court has had to imply legislative power for the Congress from the Commerce Clause.¹⁵⁴ As Professor Williams says, on this basis, ‘the very broad interpretation of the United States Commerce Clause might be seen as inappropriate and unnecessary in respect of s. 51(1)’ of the Australian Constitution.¹⁵⁵

Federalism and the trade and commerce power

As the following remarks by Justice Kitto in the *Second Airlines Case* (1965) demonstrate, the inherently *federal* nature of the Australian Constitution poses a particular obstacle to the expanded use of the trade and commerce power in a national industrial relations system. Indeed, Justice Kitto's words could be seen as a warning about the limits that the federal nature of Australian government might place on the use of any power in s. 51 in the industrial relations context, including the corporations power in s. 51(20). Justice Kitto noted American academic criticism of the US Supreme Court's departure from the concept of 'dual federalism'—that is, a sharing of legislative power between the federal government and the states—in cases on the commerce power in the US Constitution:

For the older view that the federal power over commerce could not be exercised over local transactions, which were within the exclusive area of State authority, has been substituted the notion of a plenary power of the national Government over commerce. If wheat production intended by the farmer solely for his domestic consumption can be regulated by Congress because of its possible effect upon interstate commerce, however indirect it may be, there are, in practice, no restrictions upon federal regulation of even so-called purely local commerce. And, if this is true, the American system is clearly no longer one of dual federalism'.¹⁵⁶

In contrast, as Justice Kitto emphasised, the Australian constitutional system is different. Its essentially federal nature, as reflected in the legislative powers given to the Commonwealth in s. 51 of the Constitution, can only be changed by parliament and the Australian people through the referendum process laid down in the Constitution itself. This placed a limit on the expansion of the trade and commerce power—and any other power in s. 51—a limit that the Australian High Court was bound to uphold:

The Australian union is one of dual federalism, and until the Parliament and the people see fit to change it, a true federation it must remain. This Court is entrusted with the preservation of constitutional distinctions, and it both fails in its task and exceeds its authority if it discards them, however out of touch with practical conceptions or with modern conditions they may appear to be in some or all of their applications. To import the doctrine of the American cases into the law of the Australian Constitution would in my opinion be an error.¹⁵⁷

In the same case, however, Justice Windeyer criticised such arguments as 'echoes of doctrine long discarded',¹⁵⁸ referring to the 'reserved powers' principle followed by the High Court for the first two decades after federation, under which certain areas of lawmaking were 'reserved' for the states. A Commonwealth law would be invalid if it encroached on an area of state 'reserved power'.¹⁵⁹ As discussed below, the reserved powers doctrine was abandoned by the High Court in the classic *Engineers Case* (1920).¹⁶⁰

Key points

- The trade and commerce power can be used to regulate commercial and related activities not only by *corporations* but also by *individuals, partnerships or other unincorporated bodies* — provided these activities occur across state or international boundaries. It cannot be used to regulate *intra-state* business.
- The High Court has rejected the argument that because *intra-state* commercial activity has an obvious economic connection with *inter-state* trade, it can be regulated by federal law as ‘incidental’ to the trade and commerce power. The Court has emphasised that there must be a *physical* and not merely *economic* connection between *intra-* and *inter-state* trade before commercial activity within a state can be regulated under s. 51(1).
- In the *Second Airlines Case* (1965), Justice Kitto said that the essentially federal nature of the Australian constitutional system placed a limit on the expansion of the trade and commerce power — and any other power in s. 51 — a limit that the Australian High Court was bound to uphold. Justice Windeyer, however, criticised such arguments as an echo of the ‘reserved powers doctrine’ (under which certain areas of lawmaking were ‘reserved’ for the States) abandoned by the High Court in the classic *Engineers Case* (1920).

External Affairs power—s. 51(29)

Under its general ‘executive power’ in s. 61 of the Constitution, the federal government can enter treaties and agreements with other countries without the prior approval of parliament. Under Australian law, however, international treaties and agreements are not ‘self-executory’. They require domestic legislation before they are applicable to Australia.

As the High Court pointed out in a series of cases in the 1980s, after the Commonwealth has entered an international treaty, it can use its power to make laws ‘with respect to ... external affairs’ in s. 51(29) of the Constitution, to implement obligations in the treaty as domestic law in Australia.¹⁶¹ The mere fact that an issue is part of an international treaty makes it an ‘external affair’, allowing the Commonwealth to pass domestic laws on the issue, *whether or not it is within one of the other subjects in s. 51* on which the Commonwealth can legislate. In theory, therefore, the federal government can circumvent limitations on its legislative power in the industrial relations area by entering appropriate international treaties and agreements and then implementing them as domestic law.

Early judgments of the High Court were divided on this issue, and this in turn constrained the Commonwealth’s willingness to enter international treaties. As eminent constitutional lawyer Professor Leslie Zines states:

This issue has caused acute differences among the judges of the High Court and for many years resulted in the Commonwealth acting cautiously before ratifying agreements related to subjects normally within State exclusive power.¹⁶²

In *R v Burgess; Ex parte Henry* (1936),¹⁶³ some judges supported a broad use of the external affairs power for domestic implementation of treaties.¹⁶⁴ Others were more circumspect. Justice Dixon, for example, warned that the external affairs power could only be used to implement treaty obligations which were ‘indisputably international in character’.¹⁶⁵ In a passage which might yet influence use of the external affairs power for domestic industrial relations legislation, Justice Dixon (later Chief Justice 1952–64) said that:

... it seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered as a matter of external affairs.¹⁶⁶

When the High Court next considered this aspect of the external affairs power in *Koowarta v Bjelke-Petersen* (1982),¹⁶⁷ the seven judges divided 3:3 between those who agreed with Dixon and those who rejected any limit on use of the power to implement treaty obligations. The remaining and deciding judgment was that of Justice Stephen, who thought the Dixon view was too narrow but said the subject of a treaty at least had to be a matter of ‘international concern’ before it came under the external affairs power.¹⁶⁸ However, in the *Tasmanian Dams Case* (1983),¹⁶⁹ the High Court (with two new members) abandoned even this limit. By a 4:3 majority, the High Court held that the ‘international concern’ test was too elusive, requiring evaluation of political issues which was not the proper function of a court. As Justice Mason said, ‘on a question of this kind the Court cannot substitute its judgment for that of the executive government and Parliament’.¹⁷⁰ In his view, therefore, ‘the treaty itself is a matter of external affairs, as is its implementation by domestic legislation’.¹⁷¹ In other words, therefore, any treaty obligation entered into by the federal government—whatever topic it might cover—could be enacted as domestic law under the external affairs power.

In *Victoria v Commonwealth (Industrial Relations Act Case)* (1996),¹⁷² the High Court under Chief Justice Brennan applied the *Tasmanian Dams* principle, endorsing a broad use of the external affairs power for workplace relations regulation. Amendments by the Keating Government in 1993 to the then *Industrial Relations Act 1988*¹⁷³ introduced legislative protection for the ‘right to strike’ and imposed various obligations on employers relating to termination, equal pay, minimum wages, and parental and family leave.¹⁷⁴ These provisions were not linked to ‘interstate disputes’ or ‘constitutional corporations’ etc., but were instead explicitly based on relevant international obligations, including the International Covenant on Economic, Social and Cultural Rights and various conventions of the International Labour Organisation (ILO).¹⁷⁵ According to Professor Williams:

The *Industrial Relations Act Case* demonstrated that s. 51(xxix) is a deep font of Commonwealth legislative power in the field of labour market regulation. As well as confirming that international obligations have a role to play in shaping the Australian

industrial relations system, the case focused attention on the great potential that such obligations hold for facilitating greater Commonwealth involvement in the field. As the list of topics covered by ILO instruments grows, so too will the potential for increased Commonwealth legislative action under the external affairs power.¹⁷⁶

Others agree about the potential of the external affairs power to assist in the creation of a national workplace relations regime in Australia under federal control. The High Court's Justice Kirby, for example, believes that:

... the expanded interpretation of the external affairs power in the Constitution, read in conjunction with ILO conventions to which Australia is a party, and the enlarged understanding of the corporations power under the Constitution have substantially removed ... many of the obstacles to the creation of a coherent federal labour relations law¹⁷⁷

Yet there is room for doubt about the extent to which the external affairs power could help build a single federal workplace relations system. It is unlikely to be relied on by the Howard Government for this purpose. As Creighton and Stewart note, when the Hawke and Keating Governments ratified ILO conventions without obtaining the agreement of states and territories and without ensuring that the law and practice in Australian jurisdictions was in compliance, this 'sparked particular outrage on the conservative side of politics'.¹⁷⁸ When the Howard Government came to office, it 'made clear its determination to minimise reliance upon the external affairs power as a constitutional underpinning for labour legislation'.¹⁷⁹ Few of the provisions in the current Workplace Relations Act are now based on this power.¹⁸⁰

A difficulty for a conservative government in utilising the external affairs power to implement multilateral agreements such as the ILO conventions is that these are largely concerned with the protection and extension of labour rights.¹⁸¹ According to Creighton and Stewart, 'the Commonwealth may to some extent pick and choose how much of a treaty it wishes to implement'.¹⁸² However, the principles laid down by the High Court in the *Industrial Relations Act Case* suggest that Commonwealth legislation will at least need to be broadly consistent with the particular convention or treaty. As the High Court said:

- To be valid under the external affairs power, Commonwealth legislation must be 'reasonably appropriate and adapted to' and have the 'purpose or object' of implementing the treaty
- If the legislation does not comply with all the obligations under the treaty, this may be relevant to the 'appropriate and adapted' and 'purpose' tests
- A law 'will be held invalid' if a deficiency makes it 'substantially inconsistent with the Convention'.¹⁸³

While, as Creighton and Stewart say, 'the external affairs power may remain an ace up the sleeve of any federal government looking to extend its legislative authority over employment and industrial matters',¹⁸⁴ it is unlikely under current principles laid down by the High Court to be of much attraction to conservative Australian governments. Greater use of the external

affairs power to build a unitary industrial relations system may need to await a future federal government interested in implementing the broad thrust of ILO conventions and similar international instruments.

Federalism and the external affairs power

More generally, however, it is not certain that the High Court will continue to support the sweeping use of the external affairs power to implement treaty obligations. The development of the *Tasmanian Dams* principle allowing the Commonwealth to implement any treaty obligation, whatever the subject, was contentious, supported by a bare majority in the critical cases, and with strong judicial dissent from Justice Dixon and others. The current High Court has been quick to overturn contentious decisions in other areas of the law following a change in membership.¹⁸⁵

As with the trade and commerce power, judicial criticism of the expansion of the external affairs power has focussed on the limits imposed by Australia's federal system of government. According to Chief Justice Gibbs in *Koowarta*:

... if s. 51(xxix) empowers the Parliament to legislate to give effect to every international agreement which the executive may choose to make, the Commonwealth would be able to acquire unlimited legislative power. The distribution of powers made by the Constitution could in time be completely obliterated; there would be no field of power which the Commonwealth could not invade, and *the federal balance achieved by the Constitution could be entirely destroyed*.¹⁸⁶

In *Richardson vs Forestry Commission* (1987), Justice Dawson made a similar point:

... the fact that an agreement is made internationally will not determine whether its subject-matter is external or domestic in character. Since there is no practical limit to those matters which may form the subject of international agreement, the result of taking the opposite view is that there is no practical limit to the scope of the external affairs power. That is to say, the result is that par (xxix) has the *potential to obliterate the division of legislative power otherwise effected by s. 51*. Simply as a matter of construction, I cannot believe that such a result was ever intended.¹⁸⁷

In *Koowarta* and *Tasmanian Dams*, however, Justice Mason strongly criticised arguments about the potential destruction of the 'federal balance' as a return to the discarded 'reserved powers' doctrine. In *Koowarta* he said that:

... the doctrine of reserved powers was decisively rejected in [the *Engineers Case*], though *in recent cases it seems to have re-emerged in different guises*. The rejection of the doctrine was a fundamental and decisive event in the evolution of this Court's interpretation of the Constitution and in the later cases the correctness of the rejection has never been doubted. The consequence is that it is *quite illegitimate* to approach any question of interpretation of Commonwealth power on the footing that an expansive construction should be rejected because it will effectively deprive the State of a power which has hitherto been exercised or could be exercised by them.¹⁸⁸

Unlike issues such as the environment (a central focus in cases such as *Tasmanian Dams* and *Richardson*), which will arguably always be a subject of ‘international concern’, the regulation of workplace relations is more likely to be seen as an inherently domestic matter. Should a future High Court agree with criticisms of the *Tasmanian Dams* principle, Commonwealth regulation of industrial relations could therefore be excluded from the scope of the external affairs power.

Key points

- Under its general ‘executive power’ in s. 61 of the Constitution, the federal government can enter treaties and agreements with other countries without the prior approval of Parliament.
- High Court cases in the 1980s established that any treaty obligation entered into by the federal government could be enacted as domestic law under the external affairs power in s. 51 (29). In theory, therefore, the federal government can circumvent limitations on its legislative power in the industrial relations area by entering appropriate international treaties and agreements and then implementing them as domestic law.
- However it is not certain that the High Court will continue to support the sweeping use of the external affairs power to implement treaty obligations. The development of the *Tasmanian Dams* principle allowing the Commonwealth to implement any treaty obligation whatever the subject was contentious, supported by a bare majority in the critical cases, and with strong judicial dissent.
- As with the trade and commerce power, judicial criticism of the expansion of the external affairs power has focussed on the limits imposed by Australia’s federal system of government.

Taxation power—s. 51(2)

Under s. 51(2) of the Constitution, the Commonwealth can make laws ‘with respect to ... taxation, but not so as to discriminate between States or parts of States’. It may be possible for the Federal Government to use the general nature of the taxation power to overcome the lack of a specific workplace relations power in the Constitution. The High Court has held that the Commonwealth can set whatever criteria it likes for the imposition of a tax. In *MacCormick* (1984) Justice Brennan said the taxation power:

... extends to “any form of tax which ingenuity may devise”, [and] the Parliament may select such criteria as it chooses, subject to any express or implied limitations prescribed by the *Constitution*, irrespective of any connexion between them.¹⁸⁹

This suggests that the Federal Government could require employers to adhere to its workplace relations policies if they wish to avoid additional tax, even if some of these policies are otherwise beyond its legislative power. As Chief Justice Latham said in the *Radio Corporation Case* (1938):¹⁹⁰

... it is difficult to contend that an Act relating to taxation is invalid because it is designed for the purpose of carrying out a policy of the Commonwealth Parliament which affects matters which are themselves not directly within the legislative power of the Parliament.¹⁹¹

The Commonwealth has already used the taxation power in this way in the workplace relations field by requiring employers to pay an additional levy if they do not contribute a certain amount to superannuation and training for their workers.¹⁹² The High Court upheld the validity of this approach in *Northern Suburbs General Cemetery* (1992).¹⁹³ The *Training Guarantee Act 1990* (Cth) imposed a charge on employers who did not comply with the Training Guarantee Scheme. The plaintiff said the Training Guarantee Act was unconstitutional because the Commonwealth had no power to make laws with respect to 'training'. And the Act could not come within the 'taxation power' because revenue-raising was plainly not its real purpose. The High Court disagreed, stating that the imposition of a special levy on employers who failed to meet a certain level of training expenditure was a valid use of the taxation power:

... the fact that the revenue-raising burden is merely secondary to the attainment of some other object or objects is not a reason for treating the charge otherwise than as a tax. One might as well suggest that a protective customs duty is not a tax because its primary object is the protection of a particular local manufacturing industry from overseas competition. If a law, on its face, is one with respect to taxation, the law does not cease to have that character simply because Parliament seeks to achieve, by its enactment, a purpose not within Commonwealth legislative power.¹⁹⁴

Creighton and Stewart suggest that the main obstacle to greater use of the taxation power for a unitary industrial relations system is political. In their view, the *Northern Suburbs General Cemetery Case* showed that:

... the Commonwealth could legislate to require employers (or indeed workers or unions) to observe any sort of duty or pursue any sort of policy, on pain of paying additional tax. With a little ingenuity almost any form of industrial regulation could be implemented by the Commonwealth in this manner, with the only apparent drawbacks being the cost of establishing the administrative machinery necessary to monitor compliance and collect the tax or levy from recalcitrants, and of course the inevitable political outcry.¹⁹⁵

Key points

- The Federal Government might be able to use the general nature of the taxation power to overcome the lack of a specific workplace relations power in the Constitution. The High Court has held that the Commonwealth can set whatever criteria it likes for the imposition of a tax.
- The Federal Government could require employers to adhere to its workplace relations policies if they wish to avoid additional tax, even if some of these policies are otherwise beyond its legislative power. The Commonwealth has already used the taxation power in this way in the workplace relations field by requiring employers to pay an additional levy if they do not contribute a certain amount to superannuation and training for their workers.
- The main obstacle to greater use of the taxation power for a unitary industrial relations system may be political.

Part Two—Obstacles and Limitations

Apart from the restrictions on particular powers in the Constitution, other more general limitations on the Commonwealth's legislative capacity may hamper the creation of a single industrial relations system for Australia.

An expansive use of the corporations power in s. 51(20) of the Constitution as the centrepiece of the federal government's new industrial relations program raises two related constitutional issues:

- To what extent might this be constrained by the division of legislative power in the Constitution (especially s. 51)?
- To what extent might it be constrained by the federal nature of government in Australia enshrined in the Constitution?

A further issue is the extent to which federal industrial relations laws can directly regulate state government employees. Finally, there is the question of federal control over trade unions, which have hitherto played a central (although in recent years, declining) role in Australian workplace relations. Are there constitutional constraints on regulation of trade union activities by the federal government?

Division of legislative power

As noted at the start of this paper, the drafters of the Constitution gave the Commonwealth limited power to legislate on industrial relations. The federal parliament only has specific

authority to make laws with respect to ‘conciliation and arbitration’ for the ‘prevention and settlement of industrial disputes’ ‘extending beyond the limits of any one State’. At the same time, the Constitution allows parliament to make laws about certain types of corporations, trade and commerce, external affairs and a range of other topics. What restrictions are there on the Commonwealth using these other ‘heads of power’ to circumvent its limited legislative authority on industrial relations?

One restriction on using the corporations power comes from the statutory interpretation principle *generalia specialibus non derogant*. Under this principle, where there is a conflict between general and specific provisions, the specific provisions prevail. As Pearce and Geddes, authors of the authoritative *Statutory Interpretation in Australia* state, ‘It is commonsense that the drafter will have intended the general provisions to give way should they be applicable to the same subject matter as is dealt with specifically’.¹⁹⁶

In the *Bank Nationalisation Case* (1948),¹⁹⁷ the High Court applied this principle to prevent the Commonwealth using the corporations power to overcome the specific restriction in s. 51(13)—the ‘banking power’—against federal regulation of state banks. The case involved a scheme by the Commonwealth to monopolise banking in Australia by using its power in s. 51(20) over ‘financial corporations’. The Commonwealth argued that because private banks were ‘financial corporations’, it could validly legislate to acquire control of their operations. But the High Court said that, in the case of a law about banking, the general power over corporations in s. 51(20) had to give way to the specific banking power in s. 51(13), which states that the Commonwealth can make laws ‘with respect to ... banking, other than State banking’. As Chief Justice Latham explained:

Under s. 51 (xiii.) there is power to make laws with respect to banking other than State banking. A State bank would almost certainly be a corporation, and, if so, it would be a financial corporation. If pl. (xx.) were construed to mean that the Commonwealth Parliament could pass any law whatever which touched and concerned financial corporations, then the Commonwealth Parliament could make laws controlling State banks. The result would be that the exception of State banking from the power conferred by pl. (xiii.) would mean nothing. When the two provisions are read together it is a reasonable conclusion that pl. (xx.) was not meant to reduce to complete insignificance the specific provision excluding State banking from Federal legislative power.¹⁹⁸

Similarly, Justices Rich and Williams stated that if the corporations power:

... was intended to apply to banks, the Commonwealth Parliament would thereby acquire legislative powers over State banks from which it is expressly excluded by [the banking power]. ... in our opinion [the two provisions] can only be reconciled by applying the maxim *generalia specialibus non derogant*, and by regarding corporations which are banks as placed in the separate category expressly provided for by [the banking power] and therefore as corporations outside the generality of the classes of corporations referred to in [the corporations power].¹⁹⁹

However, it is unclear whether the *generalia specialibus non derogant* principle applies in relation to the s. 51(35) labour power. The principle clearly prevents one legislative power in s. 51 being used to circumvent an *express* restriction in another. As Justice Menzies said in the *Concrete Pipes Case* (1971):²⁰⁰

... when there is to be found a limit in the definition of one subject matter the others should not be construed as enabling parliament, by legislation on a different subject matter, to override that *express* restriction.²⁰¹

While the s. 51(35) labour power is limited—that is, it can only be used to make laws for the resolution of industrial disputes ‘extending beyond the limits of any one state’—it does not contain an ‘express restriction’ in the same way that the Commonwealth’s legislative authority under the banking power is expressly confined to ‘other than State banking’. In the case of constitutional powers such as s. 51(35) containing broad limits but not express restrictions, it appears the following more general principle stated by Justice Menzies may apply:

Each subject [in s. 51 of the Constitution] is not exclusive of the others and a limit upon one cannot be inferred merely from the existence of another of more particular scope.²⁰²

In the *Concrete Pipes Case*, it was held that the Commonwealth could use the s. 51(20) corporations power to stop businesses operating within one state from making restrictive trade agreements, even though this would not be valid under the s. 51(1) trade and commerce power (which is limited to overseas and interstate trade).²⁰³

In *Pidoto* (1943),²⁰⁴ decided during the Second World War, the High Court said that the wording of s. 51(35) did not limit the ‘defence power’ in s. 51(6) of the Constitution. Mr Pidoto and his fellow workers were employed by the Public Works Department of the state of Victoria to transport explosives to ships in Port Phillip Bay. Commonwealth regulations declared that, for such workers, certain days which were public holidays under state law were to be treated as ordinary working days. Mr Pidoto and his colleagues were required to work on such days but could apply to the Commonwealth Court of Conciliation and Arbitration for orders entitling them to additional payment.²⁰⁵ Mr Pidoto claimed additional payment from his employer, the Victorian Government. Since this was purely an internal Victorian dispute and did not ‘extend beyond the limits of any one state’, regulations relying on s. 51(35) could not validly authorise a Commonwealth body to resolve such a matter. However, the High Court said that, in wartime, the Commonwealth could use the defence power—regardless of any limitations in s. 51(35)—to maintain industrial peace throughout Australia. The defence power could be used to regulate all industrial disputes for the benefit of the war effort ‘whether the dispute or unrest which threatens or disturbs industrial peace extends beyond the limits of a State or not’.²⁰⁶

Wartime cases involving the defence power in s. 51(6) are generally treated with caution as far as their precedent value is concerned. The High Court has accepted that the scope of the defence power is extremely wide at times when Australia faces direct military threat,

justifying legislation that would not be authorised during peacetime.²⁰⁷ In *Pidoto*, however, Chief Justice Latham was adamant that the limitations on Commonwealth power in s. 51(35) not only placed no restriction on the defence power during wartime, but did not limit any other power in s. 51. In his view, the labour power in s. 51(35) could not be construed so:

... as to impose a limitation upon other powers positively conferred. Further, if s. 51(xxxv.) were construed so as to prevent the Parliament from dealing with industrial matters except under that provision, similar reasoning would lead to the conclusion that the Commonwealth Parliament could not (under *any* legislative power) provide for the use of conciliation and arbitration in relation to any other matter than inter-State industrial disputes. It must, I think, be conceded, for example, that the Commonwealth Parliament can, in legislating with respect to the public service of the Commonwealth [s. 52(2)] provide for conciliation and arbitration in relation to matters such as wages, conditions and hours, whether or not any dispute about those matters is industrial, and whether or not it extends beyond the limits of any one State.²⁰⁸

The example used by Chief Justice Latham—that is, that the Commonwealth can use the s. 52(2) public service power to resolve disputes involving Commonwealth employees, even if they are entirely within one State—might be queried. Any dispute involving the ‘Commonwealth’ as an employer would necessarily seem to ‘extend beyond the limits of any one State’. Nevertheless, according to Emeritus Professor Tony Blackshield of Macquarie University, *Pidoto* establishes that ‘the limits of the conciliation and arbitration power ... can be bypassed by relying on other heads of power’.²⁰⁹ If this is the case, there is little scope for the *generalia specialibus non derogant* principle to apply in the case of the labour power, and the limitations inherent in the wording of s. 51(35) will not restrict use of the s. 51(20) corporations power for industrial relations purposes.

On the other hand, Professor Zines suggests that the limitation in s. 51(10)—which allows the Commonwealth to make laws ‘with respect to ... fisheries in Australian waters *beyond territorial limits*’—may restrict other legislative powers, such as the s. 51(29) external affairs power.²¹⁰ The labour power in s. 51(35), limiting federal regulation of industrial relations to conciliation and arbitration *beyond the limits of any one state*, contains similar wording to that of s. 51(10).

Professor Zines notes that, for the purpose of the external affairs power, ‘external’ (in the sense of beyond ‘the territory of the Commonwealth’) means *outside the low water mark*. Read on its own, the external affairs power allows the Commonwealth to regulate any event or thing beyond this mark. In the case of s. 51(10), however, High Court judgments have said that ‘beyond territorial limits’ means *beyond the three-mile territorial sea*. Professor Zines suggests that if the Commonwealth’s power to make laws with respect to fisheries is limited in this way in s. 51(10), the same restriction would apply to Commonwealth regulation of fishing under s. 51(29).²¹¹ So, under the external affairs power, the Commonwealth could only make laws controlling fishing outside the three-mile territorial limit, not the low-water mark.

Applying similar reasoning to the s. 51(35) labour power, the Commonwealth could only use the s. 51(20) corporations power, or the other ‘heads of power’ in s. 51, to make laws about conciliation and arbitration of industrial disputes extending *beyond the limits of any one state*. Even if a Commonwealth industrial relations law came within the s. 51(20) corporations power, it might not be able to regulate conciliation and arbitration *within any particular state*.

Key points

- One restriction on using the corporations power comes from the statutory interpretation principle *generalia specialibus non derogant* (where there is a conflict between general and specific provisions, the specific provisions prevail). In the *Bank Nationalisation Case* (1948) the High Court applied this principle to prevent the Commonwealth using the corporations power to overcome the specific restriction in s. 51 (13) — the ‘banking power’ — against federal regulation of State banks.
- However it is unclear whether the *generalia specialibus non derogant* principle applies in relation to the s. 51 (35) labour power. Powers such as s. 51 (35) containing broad limits but not express restrictions might not limit use of other powers in s. 51.
- In the *Concrete Pipes Case* it was held that the Commonwealth could use the s. 51(20) corporations power to stop businesses operating within one state making restrictive trade agreements, even though this would not be valid under the s. 51(1) trade and commerce power (which is limited to overseas and inter-state trade). In *Pidoto* (1943) Chief Justice Latham was adamant that the limitations on Commonwealth power in s. 51(35) did not limit any other power in s. 51.
- On the other hand, eminent constitutional lawyer Professor Leslie Zines suggests that the limitation in s. 51(10) — which allows the Commonwealth to make laws ‘with respect to ... fisheries in Australian waters beyond territorial limits’ — may restrict other legislative powers, such as the s. 51(29) external affairs power.

Federalism and legislative power

Creighton and Stewart point out that, even if Commonwealth legislation is clearly within the scope of a power listed in the Constitution, ‘it may be struck down if it exceeds those limitations which are said to be inherent in the federal character of the Constitution’.²¹²

Survival of state governments

The most obvious limitation in a federal system is the need to ensure the survival of state governments as effective governing bodies in their own right. As (then) Justice Dixon said in the *Melbourne Corporation case* (1947):

The foundation of the Constitution is the conception of a central government and a number of State governments separately organised. The Constitution predicates their continued existence as independent entities.²¹³

High Court case-law to date places some boundaries on how much federal workplace laws can encroach on the operation of state governments. But the cases do not indicate that replacement of state industrial law with federal law necessarily threatens the existence of the states as independent entities.

In *Re Australian Education Union* (1995),²¹⁴ the High Court said that the protection for the states in the Constitution has two elements. One is that Commonwealth laws cannot discriminate against or single out one or more of the states for special treatment. This means that legislation creating a national industrial relations system will need to be of general application and not be aimed at particular states.

The other element is ‘the prohibition against laws of general application which operate to destroy or curtail *the continued existence of the States or their capacity to function as governments*’.²¹⁵ In *Re Australian Education Union*, the High Court focussed on the second part of this prohibition, identifying those ‘aspects of a State’s functions which are critical to its *capacity to function as a government*’ and which could not be regulated by federal law. The Court said that it was ‘critical to the capacity of a State’ that its government had the right to determine, without interference from federal law:

- the criteria for employment of state employees,
- the number and identity of the persons it wishes to employ
- the term of appointment of such people, and
- the number and identity of people it wished to dismiss on redundancy grounds.²¹⁶

In addition, the High Court said it was also critical for state governments to determine for themselves the ‘terms and conditions’ of key office holders and higher-level employees playing central management roles. Such people included ‘Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges ... and possibly others as well’.²¹⁷

This leaves a complex position in relation to state employees and office holders. Federal laws and awards can provide for the ‘wages and working conditions’ of ‘the vast majority’ of state public servants,²¹⁸ but they cannot regulate eligibility, length or termination of employment, which must be covered by state law. And key managers and other critical state officials are outside federal regulation altogether.

This complicated situation was confirmed in the *Industrial Relations Act Case* (1996).²¹⁹ In that case, the High Court said that federal legislation could validly require a state government to inform the Commonwealth Employment Service before declaring a group of employees

redundant. But a state government could not be required under federal law to provide severance pay or consult with unions.²²⁰ According to the High Court, ordering severance pay or union consultation would ‘clearly impair’ a state’s right to determine the composition of its own workforce, affecting its capacity to function as a government.²²¹ As Creighton and Stewart note, however, ‘no explanation was given for this conclusion’.²²²

Based on these High Court cases, therefore, some aspects of state public-sector employment are beyond regulation under federal workplace relations laws. However, the more important issue is whether the protection for the states in the Constitution limits in any way the federal government’s ability to regulate private-sector employment. This involves a harder point to establish. It appears difficult to argue that replacing state regulation of the private sector with federal law could ‘destroy or curtail the continued existence of the states or their capacity to function as governments’. Victoria’s continued existence as a functioning state government despite its referral of industrial relations powers to the Commonwealth in 1996 undermines such an argument.

State government corporations

The ability of the Commonwealth to regulate the workplace relations of state-government-owned corporations may provide an important test case for the High Court. ‘Corporatised’ delivery of some government services is now accepted as essential for ‘efficient government’. Under state legislation—for example, the *State Owned Corporations Act 1989* (NSW)—such corporations are subject to government direction and are accountable to the relevant state minister, and ultimately to the state parliament, for achievement of their corporate plans and financial targets.²²³ As noted above, however, current High Court authority suggests that any corporation—including state-owned entities—will be a ‘trading or financial’ corporation for the purpose of federal regulation, under s. 51(20) of the Constitution, if trading or financial activities are a substantial or significant part of its corporate activities, regardless of the purpose for which it was formed.

In *State Superannuation Board of Victoria* (1982), the High Court held that a state body run by the Victorian government, which provided pensions to public-sector employees, was a ‘financial’ corporation under s 51(20) of the Commonwealth Constitution and could be regulated by federal law.²²⁴ In the *Tasmanian Dams Case* (1983), the High Court said that the Hydro-Electric Commission of Tasmania—despite having a key government function of formulating and executing the state’s electricity policy—was also a ‘trading’ corporation because it supplied electricity on a substantial scale.

An issue that could be raised in the High Court is whether state government corporations can be subject to full federal regulation under s. 51(20), especially in a key area such as workplace relations, and still be described as ‘state government’ bodies. It could be argued that federal regulation of such bodies might, at least in some circumstances, ‘impermissibly interfere’ with the delivery of state government services.

A counter-argument, as Professor Zines says in relation to the *Tasmanian Dams Case*, is that:

In relation to State government bodies, the State has a means of escape from the impact of Commonwealth power, namely, to ensure that the activities concerned are conducted not by a statutory, or other, corporation but by the government itself through one of its ordinary departments.²²⁵

Key points

- The most obvious limitation in a federal system is the need to ensure the survival of state governments as effective governing bodies in their own right. As (then) Justice Dixon said in the *Melbourne Corporation case* (1947), ‘the foundation of the Constitution is the conception of a central government and a number of State governments separately organised. The Constitution predicates their continued existence as independent entities’.
- In *Re Australian Education Union* (1995) the High Court said that the protection for the states in the Constitution included a ‘prohibition against laws of general application which operate to destroy or curtail *the continued existence of the States or their capacity to function as governments*’.
- In the workplace relations area, this means Federal laws and awards can provide for the ‘wages and working conditions’ of ‘the vast majority’ of state public servants, but they cannot regulate eligibility, length or termination of employment, which must be covered by state law. And key managers and other critical state officials are outside federal regulation altogether.
- The ability of the Commonwealth to regulate the workplace relations of state government owned corporations may provide an important test case for the High Court. Under state legislation such corporations are subject to government direction and are accountable to the relevant State minister, and ultimately to the State parliament, for achievement of their corporate plans and financial targets.
- However current High Court authority suggests that any corporation — including State owned entities — will be a ‘trading or financial’ corporation for the purpose of federal regulation under s. 51 (20) of the Constitution if trading or financial activities are a substantial or significant part of its corporate activities.

Federalism, industrial relations and the corporations power

Apart from whether Commonwealth industrial relations laws could ‘curtail the continued existence of the States or their capacity to function as governments’, the federal nature of the Australian Constitution might in a more general way constrain the expansive use of the corporations power and other legislative powers in s. 51.

Regulation of industrial relations has been at the heart of key High Court decisions on the nature of Australian federalism and the division of legislative power between the Commonwealth and the states. In the watershed *Engineers Case* (1920),²²⁶ the High Court held that industrial disputes involving state government instrumentalities were not cordoned off from the scope of the labour power in s. 51(35) of the Constitution.²²⁷ In reaching this decision, the High Court abandoned the 'reserved powers' doctrine followed since Federation. Under that doctrine, the Constitution was read as if anything not specifically listed as a Commonwealth power was reserved to the states and beyond Commonwealth authority.²²⁸ But in *Engineers*, the High Court said that the powers of the Commonwealth in the Constitution were to be given full effect in accordance with their ordinary and natural meaning, and without regard to whether they intruded on areas also within state law. The Court emphasised that if Commonwealth law conflicted with state law on the same subject, then, in accordance with s. 109 of the Constitution, the Commonwealth provisions would prevail.²²⁹

The decision in the *Engineers Case* led to a considerable expansion of Commonwealth power, not least in the industrial relations area. As constitutional historian David Solomon explains:

One consequence of the *Engineers Case* was that in the field of conciliation and arbitration ... there was at first a certain contraction and later a wholesale expansion of the Commonwealth's powers. Now the power extends to awards covering state public servants, school teachers, and even firemen, though each of these categories of workers was at one stage held to be outside the reach of the conciliation and arbitration power.²³⁰

Similarly, Professor Williams notes that:

The language of s. 51 lends itself to a broad construction, and hence the literalist approach endorsed by the *Engineers Case* has led to a steady growth in the scope of Commonwealth power ... an increasingly dominant Commonwealth has entered into and taken over fields of industrial relations and employment law otherwise thought to lie within the realm of State control.²³¹

As noted earlier, the *Engineers Case* is cited by those who rule out any limit on Commonwealth power based on a concern to maintain state legislative authority. Former Chief Justice Sir Anthony Mason, for example, said it was 'quite illegitimate' to reject an expansive construction of Commonwealth power because this would deprive states of a power.²³² Nevertheless, as explained above, some members of the High Court continued to express concern about the threat to Australia's federal system of government from the unlimited expansion of Commonwealth power in s. 51 of the Constitution. If, for example, any international agreement, whatever its topic, could be enacted as domestic law under the external affairs power, or if local intra-state business could be regulated under the trade and commerce power because of its economic link to interstate commerce, there would be few areas of national law beyond Commonwealth power.

To the extent that some members of the High Court saw the inherently federal nature of the Constitution as an obstacle to an expanded use of the trade and commerce or external affairs powers, the same must logically also apply to an expanded use of the corporations power, including for industrial relations purposes. According to Professor Greg Craven, executive director of the John Curtin Institute of Public Policy, a number of judges in *Re Dingjan* (1995)—the key High Court case to date on the scope of the corporations power for regulation of workplace relations—‘showed distinct signs of nervousness at the prospect of a commonwealth possessing a legislative blank cheque signed by the corporations power’.²³³

Notwithstanding the long line of authority endorsing the *Engineers Case*,²³⁴ a fundamental issue in any High Court consideration of the new Work Choices legislation will be whether and to what extent to allow for the federal balance in interpreting the scope of Commonwealth powers in the Constitution. The public debate in the lead-up to the introduction of the new legislation focussed on the Federal Government’s plan to use the corporations power to take industrial relations regulation away from the states. It is hard to see how this would not also be a central issue in arguments before the High Court on this matter.

Various commentators see the Howard Government’s plan for a unitary industrial relations system built on the corporations power as a fundamental challenge to federalism in Australia. As Professor W. J. Ford of the University of Western Australia said about the impending ‘battle’ over this plan:

... although the immediate focus of that struggle is industrial relations, in a broader sense the fundamental issues raised concern the nature and structure of Australian federalism in the 21st century.²³⁵

In April 2005, the *Australian Financial Review* warned that the Labor-controlled states and the union movement were organising High Court challenges to the Howard Government’s industrial relations plans. The paper said that:

The challenges will argue that, under the constitution, the commonwealth corporations power extends to the regulation of corporations but cannot be used for the ulterior purpose of extinguishing state industrial relations systems.²³⁶

According to Professor Craven, the reliance of the Work Choices industrial relations program on the corporations power amounts to a declaration of constitutional war on the states.²³⁷ In his view, if the corporations power:

... authorises the Howard industrial relations legislation, with its comprehensive control of the entire extended labour environment of corporations, all bets are off. That legislation will go far beyond the trading envelope of corporations, to regulate the wider work conditions of national and state populations. Once that precedent has been set, the way will be clear to use the corporations power to invade every area of state control that vaguely touches corporations. No legislative topic could be ruled out—town planning (it affects corporations), infrastructure (ditto), defamation (newspapers are corporations), property

(corporations own property), and education (universities and many schools are corporations).²³⁸

University of New South Wales constitutional law experts Keven Booker and Arthur Glass argue that allowing for the federal balance in decisions on the scope of constitutional powers does not require a return to the 'reserved powers doctrine' discarded by the *Engineers Case*. Instead, they suggest, it involves recognising what the *Engineers Case* did not do. They note former Chief Justice Barwick's statement that the *Engineers Case* meant that the legislative power of the Commonwealth had to be construed from the Constitution 'without attempting to restrain that construction because of the effect it would have upon State power'.²³⁹ As they point out, however:

Sound as this point is, there is a tension between it and another idea basic for our constitutional system, namely, that the Commonwealth powers are given within a *federal* constitution. As *Engineers* did not acknowledge the tension between these basic precepts, it is of little help in resolving it.²⁴⁰

As Booker and Glass say, the challenge is:

... to develop a body of doctrine which does not lapse into 'reserved powers thinking' but which, nonetheless, takes account of the federal context in an acceptable and workable fashion.²⁴¹

The same authors, together with Professor Robert Watt of the University of Technology Sydney, noted in a later publication that:

The notion of federal balance does not assume that particular matters are reserved for the States, although the application of it cuts down Commonwealth power and increases the area within which the States alone may legislate. It is, however, difficult to apply the notion without making some assumptions about matters being appropriate for State and not Commonwealth control.²⁴²

They emphasised, however, that:

The appeal to the federal nature of the Constitution is a legitimate and defensible appeal to a dimension of the Constitution which, at some level of influence, is a necessary feature of any rational, legal interpretation of the document. In construing the heads of power the nature of the document as a constitution effecting a distribution of power between the Commonwealth and the States cannot be entirely ignored.²⁴³

In the words of Chief Justice Gibbs in the *Actors Equity Case*, the issue in the forthcoming High Court case will be how 'to achieve the proper reconciliation between the apparent width of s. 51(xx) and the maintenance of the federal balance which the *Constitution* requires'.²⁴⁴

Concern for the federal balance might in particular impose pressure not to go beyond the 'discrimination test' explained by Justice Brennan in *Re Dingjan*, in relation to the workplace activities that can be regulated by the Commonwealth under the corporations power. As noted

above, Justice Brennan said that, to be valid under the corporations power, a Commonwealth law must have a particular or 'differential' effect on constitutional corporations.²⁴⁵ Legislation will not be valid merely because it 'relates to' or is 'connected with' corporations. As Professor Craven observes, if the High Court does not adopt the Brennan test or a similar approach, the corporations power could be used to attack 'the heart of state legislative power':

The problem is that corporations represent a wide category of legal person, whose activities extend into almost every aspect of Australian life. If the commonwealth can regulate an activity merely because it is in some way connected with a corporation, little is beyond its reach.²⁴⁶

Key points

- Regulation of industrial relations has been at the heart of key High Court decisions on the nature of Australian federalism and the division of legislative power between the Commonwealth and the States.
- In the watershed *Engineers Case* (1920), the High Court held that industrial disputes involving State government instrumentalities were not cordoned off from the scope of the labour power in s. 51 (35) of the Constitution. In reaching this decision the High Court abandoned the 'reserved powers' doctrine followed since Federation, stating that the powers of the Commonwealth in the Constitution were to be given full effect in accordance with their ordinary and natural meaning, and without regard to whether they intruded on areas also within State law.
- The *Engineers Case* is cited by those who rule out any limit on Commonwealth power based on a concern to maintain State legislative authority. Nevertheless some members of the High Court have continued to express concern about the threat to Australia's federal system of government from the unlimited expansion of Commonwealth power in s. 51 of the Constitution.
- Some commentators see the Howard Government's plan for a unitary industrial relations system built on the corporations power as a fundamental challenge to federalism in Australia. In the words of Chief Justice Gibbs in the *Actors Equity Case*, the issue in the forthcoming High Court case will be how 'to achieve the proper reconciliation between the apparent width of s. 51 (20) and the maintenance of the federal balance which the *Constitution* requires'.
- Concern for the federal balance might impose pressure not to go beyond the 'discrimination test' explained by Justice Brennan in *Re Dingjan* in relation to which workplace activities can be regulated by the Commonwealth under the corporations power.

Trade Unions and Commonwealth regulation

‘Traditional’ Australian labour law based on the conciliation and arbitration or ‘labour power’ in s. 51(35) of the Constitution allowed—perhaps even required—a central role for trade unions. As Creighton and Stewart explain:

... the traditional requirement of the federal system that there be an actual or potential interstate dispute before the [AIRC] can exercise jurisdiction effectively demands the presence of a representative body to promote or defend the interests of workers ... There is a symbiotic relationship between trade unions and the traditional system of conciliation and arbitration.²⁴⁷

Early High Court cases on the role of trade unions in the federal conciliation and arbitration system recognised both that a union could be a party to a dispute in its own right, and that it could concern itself with the employment conditions of any workers eligible to join it, whether or not they were members or even employees.²⁴⁸

Moving the constitutional basis of the federal industrial relations system from the traditional labour power to the corporations power gives trade unions a less central role.²⁴⁹ But it also makes regulation of trade unions more complex. In essence, a trade union is simply a voluntary, unincorporated association.²⁵⁰ It is not a corporation. Under the Workplace Relations Act and its predecessors, trade unions registered under the federal system have ‘body corporate’ status. But this is not based on the corporations power, which does not give the Commonwealth the ability to ‘incorporate’ entities.²⁵¹ It is instead authorised by the Commonwealth’s power to do things ‘incidental’ to the s. 51(35) labour power. As the High Court explained in *Jumbunna* (1908):

... the constitution of these representative bodies as legal entities in the corporate form is merely the adoption of a means for effectually carrying out the powers expressly conferred by [s. 51(35)] ... their creation in the form enacted is within the power conferred on Parliament by [the ‘incidental power’].²⁵²

As noted earlier, the liberal interpretation of the ‘incidental’ power by the High Court in relation to s. 51(35) allows regulation of various actions of trade unions which choose to participate in the federal system. But as the federal government moves beyond regulation of the ‘conciliation and arbitration’ system and seeks to control the workplace more generally, it must rely on other constitutional powers besides s. 51(35) to regulate trade union activity. The Commonwealth can, for example, regulate trade union activity, including industrial action, that ‘affects’ a ‘constitutional corporation’²⁵³ or which occurs in a ‘Territory’²⁵⁴ or ‘Commonwealth place’.²⁵⁵ And under Victoria’s referral of industrial relations power, it can regulate trade union activity generally in that state. However, this is a patchwork approach. As Creighton and Stewart state:

It must be borne in mind that the Commonwealth’s capacity to regulate unions is limited by the scope of its constitutional powers ... conduct is only proscribed in situations to which federal law can validly apply under one or more heads of legislative power.²⁵⁶

This leaves the possibility that, in some circumstances, trade union activities would be beyond Commonwealth control. This would occur, for example, if ‘the employer was a partnership, the union was registered under State law or was not registered at all, and the conduct took place in a State other than Victoria’.²⁵⁷

In addition, Rosemary Owens queries whether the Commonwealth can impose conditions on the internal workings of trade unions as a condition of registration and therefore incorporation under the Workplace Relations Act.²⁵⁸ She asks whether ‘such regulation runs foul of the *Incorporation Case*’ (1990)²⁵⁹ in which the High Court held that the Commonwealth had no power over incorporation under s. 51 (20) of the Constitution.

There are two other issues which are also relevant to the ability of the Commonwealth to regulate trade union activity in a unitary federal industrial relations system.

Implied freedom of political communication

Creighton and Stewart suggest that the ‘implied freedom of political communication’ in the Constitution may place some limits on the Commonwealth’s ability to legislate on aspects of workplace relations.²⁶⁰ In a series of cases in the 1990s, the High Court declared that it is an inherent requirement of the system of representative democracy established by the Constitution that the Australian people are able to communicate about political and other matters that could influence their choice of government.²⁶¹ A law cannot restrict freedom of political communication unless:

- (i) it is enacted to fulfil a *legitimate purpose* (of Australia's constitutional system); and
- (ii) the restriction is *appropriate* and *adapted* to fulfilment of that purpose.

There is no doubt that the implied freedom of political communication will apply as much in the workplace as in other areas. In *Bennett* (2003),²⁶² for example, the Federal Court held that the key regulation underpinning the official secrecy regime for Commonwealth public servants was so sweeping that it infringed the implied freedom. So it could not be used to stop a Customs official who was also a union officer from speaking to the media.²⁶³

In the context of the Federal Government’s current industrial relations plans, a particular issue noted by Creighton and Stewart is ‘whether *trade union* activities might be protected as “political” expression under this principle and hence be immune from certain kinds of legislative sanction’.²⁶⁴ The freedom of political communication extends to any non-verbal actions which are intended and are capable of expressing ideas about government and the policies/politics of the Commonwealth or the states, that is, it extends to expressive *conduct* such as protests.²⁶⁵ Industrial action and other activities by trade unions (and others) may amount to expressive conduct on political matters and be protected by the implied freedom from Commonwealth regulation.

However, actions by unions or others in the industrial relations area would only be protected by the implied freedom if they have a ‘political’ character. ‘Normal’ industrial action to achieve a wage increase or other improved conditions is unlikely to be regarded as ‘political’. So the implied freedom would not limit Commonwealth regulation of this type of action. As Professor Williams notes:

... it is unlikely that actions such as picketing will be protected by the implied freedom unless they can be seen as containing a political element. Picketing merely as part of an ongoing industrial campaign will be difficult to include within the ambit of the freedom. On the other hand, picketing seen as part of a more general protest against the policies of a government, such as ‘Green Bans’ by unions upon certain development as part of a protest against government environmental policies, may amount to protected political communication.²⁶⁶

In addition, even if industrial action is ‘political’, it will not automatically be protected by the implied freedom. The freedom is not absolute. Instead, it is balanced against other principles, values and elements of Australia’s constitutional system. As Harris points out:

The balancing process used to determine whether restrictions on political communication are unconstitutional involves the application of a proportionality test—the interest served by the legislation would have to be proportionate to the inroad on the freedom, and the freedom could only be limited to an extent that is reasonably necessary to serve the interest.²⁶⁷

In *CEPU v Laing* (1998),²⁶⁸ the Federal Court held that s. 127 of the Workplace Relations Act—allowing the AIRC to make orders prohibiting industrial action—did not infringe the implied freedom of political communication. Justice French said that the limitation of s. 127 to ‘industrial action’ and to conduct ‘relevant to the performance of work’ meant the section was:

... enacted to satisfy a legitimate end compatible with the maintenance of representative and responsible government under the Constitution and [was] reasonably appropriate and adapted to achieving that legitimate end.²⁶⁹

Implied freedom of association

An issue of particular relevance to the Australian union movement is whether there is a constitutionally guaranteed ‘freedom of association’ in the Constitution, which might limit Commonwealth regulation of industrial organisations. Writing in 1998, Professor Williams believed there was, and that it could arguably protect unions in this country:

It is difficult to see how some version of a freedom to associate could not be implied in the Constitution. The ability to associate for political purposes is obviously a cornerstone of representative government as embodied in the Constitution ... Given the strong links between the union movement and Australia’s political parties, particularly the Australian Labor Party, it is arguable that any such freedom might also apply to industrial organisations. Such a freedom might bolster the guarantee of freedom of association contained in Part XA of the Workplace Relations Act.²⁷⁰

It was the High Court in the 1990s, under Chief Justices Mason and Brennan, that ‘discovered’ a freedom of political communication in the Constitution. At that time, there was also support from some judges for ‘a freedom of association at least for the purposes of the constitutionally prescribed system of government and the referendum procedure’.²⁷¹ However, the current High Court, under Chief Justice Gleeson, is less willing than its forerunner to imply rights and protections from the text and structure of the Constitution. As Professor Craven says, ‘today’s High Court is a far less athletic body than it was: where the Mason Court leapt, the Gleeson Court barely twitches’.²⁷² In *Mulholland* (2004),²⁷³ only Justices McHugh and Kirby agreed that the Constitution contained a ‘freestanding’ right of association on political matters.²⁷⁴ Other judges either rejected the existence of any such right, or thought that it might only exist as a corollary to the implied freedom of political communication.²⁷⁵

What this means is that, at least under the current High Court, unions formed for ‘industrial’ or workplace relations reasons will receive little protection from federal legislation on the basis of an implied right of association in the Constitution. It is unlikely that a majority of the current High Court would agree that a separate constitutional right of association existed. Even if they did, however, it appears that, as with the implied freedom of political communication, any such right could only restrict Commonwealth regulation of association for *political*, not *industrial*, purposes. Even Justice Kirby in *Mulholland*, while arguing that ‘it is impossible to deny an implication of free association to some degree’,²⁷⁶ was only prepared to accept:

... that there is implied in ss 7 and 24 of the Constitution a freedom of association and a freedom to participate in federal elections extending to the formation of political parties, community debate about their policies and programmes, the selection of party candidates and the substantially uncontrolled right of association enjoyed by electors to associate with political parties and to communicate about such matters with other electors.²⁷⁷

Key points

- ‘Traditional’ Australian labour law based on the labour power in s. 51(35) of the Constitution allowed, perhaps even required, a central role for trade unions. Moving the constitutional basis of the federal industrial relations system to the corporations power gives trade unions a less central role. It also makes regulation of trade unions more complex. In some circumstances trade union activities may be beyond Commonwealth control.
- Actions by unions or others in the industrial relations area could only be protected by the implied freedom of political communication if they have a *political* and not merely *industrial* character.
- It is unlikely that a majority of the current High Court would agree that a separate constitutional right of association existed. Even if they did, it appears that as with the implied freedom of political communication, any such right could only restrict Commonwealth regulation of association for *political*, not *industrial* purposes.

Part Three—Other Issues

Estimated coverage of Australian workforce

Precisely how much of the Australian workforce would be covered by federal workplace legislation centred on the corporations power is not clear. The complexity of Australia's industrial relations laws makes any definitive survey impracticable.

According to Professor McCallum, an extensive use of the corporations power 'could cover approximately three quarters of the private sector workforce'.²⁷⁸ Government estimates are higher, with Prime Minister Howard suggesting in April 2005 that the reform package would bring 85–90 per cent of the workforce into a national system.²⁷⁹ This includes use of other sources of legislative power in the Constitution besides the corporations power, including the s. 122 territories power, s. 51(1) trade and commerce power, s. 51(29) external affairs power, s. 52(2) public service power and s. 51(6) defence power, as well as the referral of industrial relations power from Victoria under s. 51(37).

A discussion paper issued by former Minister Peter Reith in 2000 said that with a new Workplace Relations Act primarily based on the corporations power:

... as many as two and a half million additional employees could be brought into the federal system and that overall federal coverage could rise from just over 50 per cent of all Australian non-farm employees to about 85 per cent. State award/agreement coverage could fall from 36 per cent to about 13 per cent. The proportion of award free employees could fall dramatically from about 13 per cent to about 2 per cent.²⁸⁰

Similarly when releasing its *WorkChoices* booklet, the Government said it will:

... directly cover up to 85 per cent of Australian workers. That includes everyone working for incorporated companies as well as employees of Australian Government bodies (such as the Australian Tax Office) and employees working under State awards or agreements who are employed by a Constitutional corporation.²⁸¹

The Government noted that the Work Choices system would not cover people 'employed by ... unincorporated businesses in the state system and some state government employees'.²⁸²

Figures released by the Australian Bureau of Statistics in October 2005 show that, of the 837 000 businesses which employ people in Australia, some 402 000 are unincorporated (sole proprietors, partnerships, trusts etc).²⁸³ In response to these figures, a statement from the Australian Labor Party (ALP) noted that the corporations power could not be used to regulate workplace relations in these businesses, claiming this was 'the constitutional hole in the Government's leaky plans'.²⁸⁴ The statement said there were 'constitutional question marks ... over other industries as well', such as the 'massive not-for-profit sector' and local government.²⁸⁵ According to the ALP:

Despite promising to make one simpler, national system, John Howard will be creating an even more complex system where businesses and employees will not know whether they are covered by state or federal employment laws. In some cases, it will be so unclear that it will take the High Court to resolve the issue. The promise of a single national system, without support from the States, is a myth. It will be confusing, messy and will spurn [sic] lots of litigation. Instead of finding themselves in the Industrial Relations Commission, small businesses might find themselves in the High Court—with only the Howard Government to blame.²⁸⁶

Based on the broad estimates from the Government and others, a sizeable segment of the Australian workforce—somewhere between 10–25 per cent—would remain outside a federal industrial relations system centred on the corporations power. There is therefore some basis for suggesting that the federal government proposals will not create a single unitary industrial relations system for Australia.

Key Points

- Precisely how much of the Australian workforce would be covered by the new federal workplace legislation is not clear. The complexity of Australia's industrial relations laws makes any definitive survey impracticable.
- Based on the broad estimates from the Government and others, however, a sizeable segment of the Australian workforce — somewhere between 10—25 per cent — would remain outside a federal industrial relations system centred on the corporations power.

Prospects for a High Court challenge

A High Court challenge to the Howard Government's proposed national system of federal workplace relations laws has already been signalled by the states.²⁸⁷ The prospects for such a challenge will depend heavily on the High Court's view of the scope of the corporations power in s. 51(20) of the Constitution.

Writing in 2000, Professor Stewart surmised that, based on his view that a majority of the High Court in *Re Dingjan* supported a broad use of the corporations power:

... the option floated by [former Minister for Workplace Relations and Small Business] Peter Reith of underpinning federal industrial regulation with the corporations power rather than the arbitration power would seem to be soundly based, at least in terms of constitutionality ...²⁸⁸

He also warned, however, that 'a differently constituted High Court in the future may yet adopt one of the narrower views expressed in *Dingjan*'.²⁸⁹

The current High Court is indeed very different to the one that decided *Re Dingjan* in 1995. All of the judges who supported a broad view of the corporations power have now resigned (Mason, Deane, Gaudron and McHugh). Similarly, none of the judges advocating a narrower role for s. 51(20) (Brennan, Dawson and Toohey) remain on the High Court.

Commentators often describe the current High Court as ‘conservative’. In May 2005, Professor Stewart maintained his view that a constitutional challenge to a unitary industrial relations system ‘is likely to fail in relation to most of what the Federal Government wants to do, and it may fail completely’.²⁹⁰ As he explained:

This is a conservative High Court, and I would find it unlikely that it would overturn previous decisions on the scope of the corporations power and provide a radical new interpretation of the corporations power and Commonwealth powers that would narrow the scope of the corporations power.²⁹¹

As Professor Stewart himself pointed out, however, there is yet to be a definitive High Court decision on the scope of the corporations power. So to the extent that the High Court may feel bound by its previous judgments, there is no previous authoritative case to guide them. In relation to the federal government’s ability to regulate workplace activities, cases in lower courts—including the Full Federal Court and the NSW IRC—have taken the precaution of applying Justice Brennan’s narrower ‘discrimination’ test as the furthest they could safely go in determining an authoritative principle from the leading High Court case in this area, *Re Dingjan*.

In addition, the Howard Government’s proposal for a unitary industrial relations system—taking over state functions using a broad or ‘liberal’ interpretation of the corporations power—is *prima facie* inconsistent with a ‘conservative’ legal approach. As the *Australian Financial Review* explained in April 2005:

While the Howard government has appointed five of the current seven justices on the High Court who would hear any challenge, conservative benches have traditionally favoured state rights over federal rights. They also tend to make narrow interpretations of constitutional powers.²⁹²

More than one observer has reminded the Howard Government of the ‘salutary’ example of the High Court’s decision in the *Incorporation Case* (1990).²⁹³ This concerned an attempt by the Hawke Government to use the corporations power to enact a single national corporations law. As Professor Williams notes:

At the time, it was widely believed that the law would be held valid by the High Court, and the Commonwealth passed the Act without support from the States, such as in the form of a co-operative scheme or a referral of power.²⁹⁴

However, in what Professor Craven describes as a ‘shattering blow’,²⁹⁵ the High Court ruled 6:1 against the Commonwealth. The Court declared that the corporations power could not be used to build a national corporations regime. At the very least, this precedent must place a

question mark over the Commonwealth's ability to use the corporations power to build a national industrial relations regime.

Key points

- The prospects for High Court challenge to the Work Choices legislation will depend heavily on the Court's view of the scope of the corporations power in s. 51(20) of the Constitution. There is no previous definitive High Court case to guide the current High Court. And membership of the Court has changed completely since the last major case in 1995 on the scope of the corporations power.
- Commentators often describe the current High Court as 'conservative'. The proposal for a unitary industrial relations system — taking over state functions using a broad or 'liberal' interpretation of the corporations power — is *prima facie* inconsistent with a 'conservative' legal approach.
- In the *Incorporation Case* (1990) the High Court ruled 6:1 against an attempt by the Hawke Government to use the corporations power to enact a single national corporations law. At the very least this precedent must place a question mark over the Commonwealth's ability to use the corporations power to build a national industrial relations regime.

Conclusion

Building a national industrial relations regime without a referral of powers from the states involves a patchwork approach. Moreover, use of the corporations power as the centrepiece of a national workplace relations 'quilt' is not on unshakeable ground. There were narrow majorities in key High Court decisions on the scope of this power, and there are limitations in any case both on the range of activities and the type of entities it can cover. While the weight of academic and other legal opinion generally seems to endorse extensive coverage of Australian workplace relations by the Work Choices regime based on the corporations power, the under-developed state of the law in this area means this is essentially speculation, however erudite it might be. With a High Court entirely composed of new members since the last major case on the corporations power and workplace relations—*Re Dingjan* (1995)—there is no guarantee that the court will follow any of the approaches set down in that case or earlier decisions. The fact that on the key issue for the validity of the Work Choices legislation—the range of workplace activities that can be regulated under the corporations power—none of the various approaches in *Re Dingjan* offers clear practical guidance, suggests that the current High Court might be better to develop its own more practically focussed approach.

After considering potential constitutional issues with the 2005 Bill, Rosemary Owens concludes that 'my suspicion is that in so far as the validity of the 2005 Bill may be a problem—it will only be so at the edges'.²⁹⁶ However, if, as Ms Owens suggests, the High Court will need to start again with first principles, at the very least employers will need to

factor in a real risk that it may be more than the edges of the Work Choices legislation that cause constitutional problems.

As with the trade and commerce and external affairs powers, the prospect of an unlimited use of corporations power raises major fears for federalism. It may make sense to have a unitary industrial relations system and do away with the complexity of a multitude of different industrial relations regimes. But as Justice Kitto said in the *Second Airlines Case*, the High Court is entrusted with maintaining federalism as an essential constitutional distinction, even in the face of such practical considerations. Moreover, as Professor Craven emphasises, there is more at stake in the forthcoming High Court case than achieving an efficient Australian industrial relations system, however important that aim may be. The balance of power between the central government in Canberra and the regional governments in the states and territories has been the key to the inherent stability of the democratic system of government in Australia since Federation. Some argue that the increasing transfer of governmental power to the federal government, in this instance in industrial relations, may undermine that stability in the longer term.

From the perspective of state governments, the key issue in the Howard Government's Work Choices industrial relations program is the threat to the balance of power between the Commonwealth and the states. It would be strange indeed if this fundamental issue could not be raised in the forthcoming High Court challenge initiated by the states. The task for the states is how to enable the High Court to consider this issue in the context of the degree of regulatory authority that should be allowed to the Commonwealth under the corporations power. As Booker and Glass suggest, the states will need to develop a body of doctrine for constitutional interpretation of the corporations power in the industrial relations context 'which does not lapse into reserved powers thinking but which, nonetheless, takes account of the federal context in an acceptable and workable fashion'.²⁹⁷

Even with its current incomplete coverage, it appears that the corporations power, backed by the trade and commerce, territories, external affairs, taxation powers, etc., can cover a significant proportion of the Australian workforce. An issue of fundamental practical importance for employers and workers, however, is the possibility that the Work Choices legislation may simply replace the current multi-layered industrial relations scheme with a patchwork federal system covering the majority of employees but with a significant minority still under state schemes, and with a range of workplace activities also beyond federal regulation. Whether this eventuates will take some time to determine, and will depend heavily on the outcome of the impending High Court case, including whether the Court is prepared to go further than its traditional incremental approach and lay down a clear framework as to which entities and activities can validly be regulated under a federal scheme. It would be useful if the High Court's decision helped reduce any need for employers to obtain expensive legal advice or even go to court before they know whether their organisations or particular activities are under federal or state industrial relations law.

As well as the prospect of incomplete coverage of employers and workplace activities, an important additional complexity suggested by the *Newcrest Case* (see p. 32) is that state

industrial awards may remain in place even if suspended for the duration of a federal workplace agreement.

As noted at the start of this paper, there is a widespread view that the current regime of six different industrial relations systems is confusing and inefficient for a country of Australia's limited economic size. The potential for an industrial relations regime based on the proposed Work Choices legislation to be incomplete and multi-layered suggests that it might be in the interests of all parties to explore a more cooperative approach. Professor McCallum believes that a single national labour law regime should be achieved through cooperation between federal, state and territory governments. Unfortunately, he says:

... insufficient efforts have been made by either level of government on this front and Australian employees and business enterprises deserve much stronger efforts in this regard from our politicians.²⁹⁸

Professor Williams also advocates co-operation between the Commonwealth and the states in regulation of workplace relations, noting that such an approach was forced on the Hawke/Keating Governments in the corporations law area by the Commonwealth's failure in the *Incorporation Case*:

Today, such co-operation provides the foundation for Australia's national corporations law. In the field of industrial relations, this may ultimately provide a better model for achieving a single national law.²⁹⁹

Key points

- While the weight of academic and other legal opinion generally seems to endorse extensive coverage of Australian workplace relations by the Work Choices regime based on the corporations power, the under-developed state of the law in this area means this is essentially speculation, however erudite it might be. Employers will need to factor in a real risk that it may be more than the edges of the Work Choices legislation that cause constitutional problems.
- As with the trade and commerce and external affairs powers, the prospect of an unlimited use of the corporations power raises major fears for federalism. In any High Court challenge, the States will need to develop a body of doctrine for constitutional interpretation of the corporations power in the industrial relations context 'which does not lapse into reserved powers thinking but which, nonetheless, takes account of the federal context in an acceptable and workable fashion'.
- There is a widespread view that the current regime of six different industrial relations systems is confusing and inefficient for a country of Australia's limited economic size. But there is also potential for the proposed Work Choices workplace system to be incomplete and multi-layered. This suggests that it might be in the interests of all parties to explore a more cooperative approach.

Endnotes

1. Bills Digest No. 66 of 2005-06.
2. Sections 51 and 52 of the [Constitution](#). For background on the Constitutional Conventions in the 1890s and development of the Commonwealth's industrial relations power, see J. Macken, *Australian Industrial Laws: the Constitutional Basis*, Law Book Co., Sydney, 1980, pp. 1–13.
3. Constitution, s. 107.
4. Constitution, s. 109.
5. R. McCallum, '[The Australian Constitution and the Shaping of our Federal and State Labour Laws](#)', *Deakin Law Review*, vol. 10, no. 2, 2005, p. 461.
6. For an account of the democratic history of the adoption of the Constitution, see G. Craven, *Conversations with the Constitution: not just a piece of paper*, UNSW Press, Sydney, 2004, p. 20.
7. Section 51(35) of the Constitution.
8. Australian Government, [WorkChoices. A New Workplace Relations System](#), Commonwealth of Australia, Canberra, 2005, p. 11.
9. Unlike the AIRC, however, state tribunals and courts are not required to adhere to the separation of judicial and arbitral powers inherent in the federal Constitution.
10. Hon. K. Andrews (Minister for Employment and Workplace Relations), [A National System: Taking South Australia to 2010](#), address to a seminar hosted by Business SA, Adelaide, 4 May 2005, p. 2.
11. B. Creighton and A. Stewart, *Labour Law*, 4th ed., Federation Press, Sydney, 2005, p. 86.
12. *ibid.*
13. Australian Government, [WorkChoices](#), *op. cit.*, p. 7.
14. [Explanatory Memorandum](#), Workplace Relations Amendment (Work Choices) Bill 2005, p. 1.
15. K. Andrews, '[Second reading speech: Workplace Relations Amendment \(Work Choices\) Bill 2005](#)', House of Representatives, *Debates*, 2 November 2005, p. 13.
16. 'I'm not a centralist, says Howard, as he defends state IR grab', *workplace express*, 11 April 2005; and see J. Howard, '[Ministerial statement: workplace relations reform](#)', House of Representatives, *Debates*, 26 May 2005, pp. 38–43.
17. Creighton and Stewart, *op. cit.*, p. 55.
18. *ibid.*, p. 124. The issue was put to a referendum in 1911, 1913, 1919, 1926, 1944, 1946 and 1973.
19. *Commonwealth Powers (Industrial Relations) Act 1996* (Vic).
20. 'Other states will refer IR powers—Andrews', *workplace express*, 10 May 2005.
21. *ibid.*

22. 'Leave our systems alone: Conservative states join ALP in opposing federal takeover', *workplace express*, 21 April 2005.
23. '[State conservative MPs worried about Federal IR control](#)', *PM*, radio program transcript, ABC Radio National, 22 April 2005.
24. *Commonwealth Powers (Industrial Relations) Act 1996* (Vic), s. 5.
25. Prime Ministerial statement, op. cit., pp. 8-9.
26. See J. Macken, op. cit., pp. 1-13.
27. N. Gunningham, *Industrial Law and the Constitution*, Sydney, Federation Press, 1988, p. 3.
28. Creighton and Stewart, op. cit., p. 49.
29. Macken, op. cit., p. 14.
30. *ibid.*, p. 13.
31. See also the federal government's summary of the limitations of s. 51(35) in Department of Employment, Workplace Relations and Small Business (DEWRSB), *Breaking the Gridlock: Towards a Simpler National Workplace Relations System*, [Discussion Paper 1: The Case for Change](#), Canberra, 2000, pp 16-17.
32. Creighton and Stewart, op. cit., p. 85.
33. McCallum, '[Australian Constitution](#)', op. cit., p. 462.
34. *R v Coldham; Ex parte Australian Social Welfare Union* ('Social Welfare Case') (1983) 153 CLR 297. The High Court 'effectively signalled that all types of employee may have the capacity to access the federal system'. See Creighton and Stewart, op. cit., p. 97.
35. McCallum, '[Australian Constitution](#)', op. cit., p. 462.
36. Creighton and Stewart, op. cit., pp. 85-6.
37. *ibid.*, pp. 89, 95.
38. *ibid.*, p. 104.
39. Creighton and Stewart, op. cit., p. 123.
40. *ibid.*, p. 124.
41. *Victoria v Commonwealth* (1996) 187 CLR 416.
42. *Re Pacific Coal; ex parte CFMEU (Pacific Coal Case)*(2000) 203 CLR 346.
43. McCallum, '[Australian Constitution](#)', op. cit., p. 466.
44. *ibid.*, p. 463.
45. *Ex parte H V McKay Ltd* (1907) 2 CAR 1.
46. M. Kirby, 'Industrial Conciliation and Arbitration in Australia: A Centenary Reflection', *Australian Journal of Labour Law*, vol. 17, 2004, pp. 229, at 236.
47. Creighton and Stewart, op. cit., p. 105.

48. *ibid.*, p. 125.
49. In *NSW v Commonwealth (Incorporation Case)* (1990) 169 CLR 482, the High Court held that the use of the word ‘formed’ in s. 51(20) meant that the corporations power could not validly be used to regulate the process of incorporation and could only cover corporations already ‘formed’. This effectively wrecked an attempt by the Hawke Labor Government to establish a single uniform corporations law regime under federal control. See R. Tomasic and S. Bottomley, *Corporations Law in Australia*, Sydney, Federation Press, 1995, pp. 29–31.
50. Creighton and Stewart, *op. cit.*, p. 106.
51. DEWRSB, [A new structure](#), *op. cit.*, p. iii.
52. *ibid.*
53. R. McCallum, ‘Justice at Work: Industrial Citizenship and the Corporatisation of Australian Labour Law’, Kingley Laffer Memorial Lecture, University of Sydney, 11 April 2005, p. 16.
54. McCallum, ‘[Australian Constitution](#)’, *op. cit.*, p. 469.
55. *ibid.*
56. *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, pp. 490–1.
57. *Actors & Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169.
58. [WorkChoices](#), *op. cit.*, p. 11 (emphasis added).
59. Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005, p. 9.
60. *R v Judges of the Federal Court of Australia and Adamson; Ex parte Western Australian National Football League (Inc) and West Perth Football Club* (1979) 143 CLR 190.
61. *ibid.*, p. 199 (emphasis added). On the other hand, the Commonwealth is not free to define terms such as ‘constitutional corporations’ exactly as it pleases, in case it contravenes the ‘stream cannot rise above its source’ doctrine. As Zines notes:

The power of the Commonwealth to confer authority on members of the executive or administration is restricted by the Constitution in two major respects—first, by the principle of the separation of powers, and, secondly, by the doctrine that no law can give power to any person (other than a court) to determine conclusively any issue upon which the constitutional validity of the law depends. The second doctrine is sometimes metaphorically summed up in the maxim ‘the stream cannot rise above its source’...

L. Zines, *The High Court and the Constitution*, 4th ed., Butterworths, Sydney, 1997, p. 219, citing *Heiner v Scott* (1914) 19 CLR 381, p. 393, per Griffith CJ.
62. 143 CLR 190, p. 200.
63. DEWRSB, [The Case for Change](#), *op. cit.*, p. 63.
64. *ibid.*
65. G. Williams, *Labour Law & the Constitution*, Federation Press, Annandale, 1998, p. 107.
66. (1990) 169 CLR 482, p. 498, cited in *ibid.*, p. 107.

67. *R v Judges of the Federal Court of Australia and Adamson; Ex parte Western Australian National Football League (Inc) and West Perth Football Club* (1979) 143 CLR 190.
68. *ibid.*, p. 208 (emphasis added).
69. *ibid.*, pp. 210–11.
70. *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282.
71. *ibid.*, p. 306.
72. *ibid.*, pp. 304–5.
73. (1983) 152 CLR 570.
74. *ibid.*, p. 602; see Williams, *op. cit.*, p. 110.
75. (1979) 143 CLR 190, pp. 233–4.
76. *ibid.*, p. 219.
77. *ibid.*
78. If the High Court adopted a ‘purpose’ test, incorporated entities with, for example, a ‘not-for-profit’ purpose formally stated in their constitution, could engage in substantial trading or financial activities and not be covered by laws made under s. 51(20), but still gain the legal protection of incorporated status.
79. ‘1.2 million workers in the cold’, *Workforce*, Issue 1114, 9 May 1997, p. 1, cited in Creighton and Stewart, *op. cit.*, p. 108.
80. Creighton and Stewart, *op. cit.*, p. 108.
81. Under s. 122 of the Constitution, the Commonwealth has full power to make laws for Australian territories.
82. Adele Ferguson, ‘The \$70-billion sacred cow’, *BRW*, March 24–30 2005.
83. Jennie Granger (Second Commissioner, Australian Taxation Office), [*Speech to Macquarie Bank’s Accountants Practice Management Day*](#), 14 May 2004.
84. Although the ‘trustee’ may itself be a corporation and be subject to the corporations power.
85. S. 7.
86. S. 4.
87. *Associations Incorporation Act 1991* (ACT); *Associations Incorporation Act 1981* (Qld); *Associations Incorporation Act 1985* (SA); *Associations Incorporation Act 1987* (WA); *Associations Incorporation Act 1981* (Vic); *Associations Incorporation Act 1964* (Tas). Under the Northern Territory’s *Associations Act 2003*, associations formed by prescribed ethnic communities may be incorporated even if formed for the purpose of trading or obtaining financial profits for members.
88. In theory, it appears possible for a body to validly register under associations incorporation legislation as a non-trading or non-financial body, and subsequently engage in substantial trading

or financial activity, bringing it within the High Court's definition of a s. 51(20) corporation. This would depend on whether there was any review once a body was incorporated.

89. Sources: government statements and annual reports.
90. Victoria (referral) and ACT (s. 122) are subject to Commonwealth power under other parts of the Constitution.
91. A. Stewart, 'Federal Labour Law and New Uses for the Corporations Power', *Proceedings from the 8th Annual Labour Law Conference: Key Developments in Labour Law*, 16 June 2000, p. 9; see also 'High Court challenge likely, but Government in strong position', *workplace express*, 27 May 2005.
92. (1909) 8 CLR 330.
93. Williams, *op. cit.*, p. 105.
94. *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.
95. 124 CLR 490–1; cited in Williams, *op. cit.*, p. 106.
96. *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169.
97. *ibid.*, p. 207.
98. *ibid.*, pp. 207–8 (emphasis added).
99. *ibid.*, p. 212 (emphasis added).
100. Williams, *op. cit.*, p. 112.
101. *ibid.*, p. 124.
102. *Commonwealth v Tasmania* (1983) 158 CLR 1.
103. Williams, *op. cit.*, p. 115.
104. *ibid.*
105. *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.
106. *ibid.*, pp. 333–4 (emphasis added).
107. Williams, *op. cit.*, p. 116.
108. Justices Dawson, Brennan, Toohey and McHugh were in the majority; Chief Justice Mason and Justices Gaudron and Deane dissented.
109. (1995) 183 CLR 323, p. 369 (emphasis added).
110. *ibid.*
111. A. Stewart, *op. cit.*, p. 10.
112. Williams, *op. cit.*, pp. 118–9.
113. Creighton and Stewart, *op. cit.*, p. 106.
114. Williams, *op. cit.*, pp. 118.

115. Creighton and Stewart, *op. cit.*, pp. 106–7.
116. A. Stewart, *op. cit.*, p. 11.
117. *Rowe v TWU* (1998) 160 ALR 66.
118. *Quickenden v O'Connor* (1999) 166 ALR 385.
119. A. Stewart, *op. cit.*, p. 11.
120. *ibid.*, p. 10.
121. (1995) 183 CLR 323, p. 336.
122. *ibid.*, p. 353.
123. *ibid.*, p. 346, citing Gibbs CJ in *Actors Equity* (1982) 150 CLR 169, pp. 182–3.
124. (2001) 184 ALR 260.
125. *ibid.*, p. 273 (emphasis added).
126. *ibid.*
127. [2005] NSWIRComm 23.
128. *ibid.*, para. [53] (emphasis added).
129. *ibid.*, para. [68].
130. [*Victoria v Commonwealth*](#) (1996) 187 CLR 416.
131. 187 CLR 416, p. 539; see Williams, *op. cit.*, p. 120.
132. Creighton and Stewart, *op. cit.*, p. 106.
133. Williams, *op. cit.*, p. 119.
134. R. Owens, 'The Constitution and the Law of Work in the New Economy: *The Workplace Relations Amendment (Work Choices) Bill 2005*', paper presented to Tenth Anniversary Annual Public Law Weekend, Australian National University, 11–12 November 2005, p. 15.
135. (2000) 202 CLR 479, para. [16]; see *ibid.*, pp 15–16. These principles are:
 - The constitutional text is to be construed 'with all the generality which the words used admit
 - The character of the law in question [i.e. whether it is within a particular 'head of power'] must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates
 - The practical as well as the legal operation of the law must be examined to determine if there is a sufficient connection between the law and the head of power
 - A law will be valid if it can be described as a law with respect to a subject in s. 51, even if it can also be described as a law about a subject not included in s. 51

- If a sufficient connection with a head of power does exist, the justice and wisdom of the law, and whether the means it adopts are necessary or desirable, are matters of legislative choice.
136. (1931) 44 CLR 492.
 137. B. Harris, *Essential Constitutional Law*, 2nd ed., Cavendish Publishing, 2004, p. 122.
 138. Creighton and Stewart, op. cit., pp. 108–9.
 139. [WorkChoices](#), op. cit., p. 11.
 140. Williams, op. cit., p. 128.
 141. Creighton and Stewart, op. cit., p. 109 (emphasis added).
 142. Harris, op. cit., pp 122–3, citing *Airlines of NSW Pty Ltd v NSW (No. 2)* (1965) 113 CLR 54; *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492.
 143. *Airlines of NSW Pty Ltd v NSW (No. 2)* (1965) 113 CLR 54.
 144. *ibid.*, pp. 115–17 (Kitto J); see Harris op. cit., p. 123.
 145. (1965) 113 CLR 54, pp. 97–8.
 146. *ibid.*, p. 80 (Barwick CJ) (emphasis added).
 147. Harris, op. cit., p. 123.
 148. (1965) 113 CLR 54, p. 88.
 149. Creighton and Stewart, op. cit., p. 109. Article 1, section 8, clause 3 of the US Constitution states that the Congress shall have power ‘to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes’. In *National Labour Relations Board v Jones & Laughlin Steel Corporation* (1937) 301 US 1, the US Supreme Court said that as long as the subject matter of a federal US law had a ‘substantial effect’ on interstate commerce it would be within power (Williams, op. cit., p. 142).
 150. Williams, op. cit., p. 145.
 151. *ibid.*, p. 144.
 152. *ibid.*, p. 145.
 153. *ibid.*, p. 144.
 154. *ibid.*
 155. *ibid.*
 156. B. Schwartz, *American Constitutional Law* (1955), p. 170, cited in (1965) 113 CLR 54, pp 114–15.
 157. (1965) 113 CLR 54, p. 115.
 158. *ibid.*, p. 149.
 159. S. Joseph and M. Castan, *Federal Constitutional Law: A Contemporary View*, Lawbook Co., Sydney, 2001, pp 43–4.

160. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
161. Subject to prohibitions in the Constitution. For example, as Harris points out, the Commonwealth could not implement as domestic law a treaty agreeing to establish a particular religion. This would contravene s. 116 of the Constitution. Harris, op. cit., p. 134.
162. Zines, op. cit., p. 276.
163. *R v Burgess; Ex parte Henry* (1936) 55 CLR 608.
164. Chief Justice Latham and Justices Evatt and McTiernan: see discussions in Williams, op. cit., p. 92; Joseph and Castan, op. cit., p. 86.
165. (1936) 55 CLR 608, p. 669; see Williams, op. cit., p. 92.
166. (1936) 55 CLR 608, p. 669.
167. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.
168. See Williams, op. cit., p. 93; Joseph and Castan, op. cit., pp. 86–88.
169. (1983) 158 CLR 1.
170. *ibid.*, p. 125.
171. *ibid.*, p. 123.
172. (1996) 187 CLR 416.
173. Now the *Workplace Relations Act 1996*.
174. Creighton and Stewart, op. cit., p. 110.
175. *ibid.*, pp. 490–1; Williams, op. cit., pp. 98–100.
176. Williams, op. cit., p. 100.
177. Kirby, op. cit., p. 240.
178. Creighton and Stewart, op. cit., p. 78.
179. *ibid.*, p. 110.
180. *ibid.*
181. See generally *ibid.*, pp. 64–83.
182. *ibid.*
183. (1996) 187 CLR 416, pp. 487–8; see Williams, op. cit., p. 97.
184. Creighton and Stewart, op. cit., p. 110.
185. For example, in the area of nationality and the ‘aliens’ power, see Peter Prince, ‘[Deporting British Settlers](#)’, *Research Note*, no. 33, Parliamentary Library, Canberra, 2003–04.
186. (1982) 153 CLR 168, p. 198 (emphasis added).
187. *Richardson vs Forestry Commission* (1987) 164 CLR 261, p. 321 (emphasis added).

188. (1982) 153 CLR 168 at 227 (emphasis added); and see also Justice Mason's comment in *Tasmanian Dams* that 'it is well settled that it is wrong to construe a constitutional power by reference to ... an assumption that there is some content reserved to the States'. (1983) 158 CLR 1 at 128. See Joseph and Castan, op.cit., pp 45 and 87-88.
189. *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, pp. 654–5. The quotation in Justice Brennan's decision is taken from Justice Aikin's decision in *The General Practitioners Society In Australia v The Commonwealth* (1980) 145 CLR 532, p. 569, where His Honour stated at that 'the tax power is not limited to old or well-known taxes but extends to any form of tax which ingenuity may devise'.
190. *Radio Corporation Pty Ltd v The Commonwealth* (1938) 58 CLR 170.
191. *ibid.*, pp. 179–80. Justices Rich, Starke and McTiernan agreed with the Chief Justice's observation.
192. *Superannuation Guarantee Charge Act 1992* (Cth); *Superannuation Guarantee Administration Act 1992* (Cth); *Training Guarantee Act 1990* (Cth); *Training Guarantee (Assessment) Act 1990* (Cth); see Creighton and Stewart, op. cit., p. 111.
193. *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1992) 176 CLR 555.
194. *ibid.*, p. 569.
195. Creighton and Stewart, op. cit., p. 111.
196. D.C. Pearce, R.S. Geddes, *Statutory Interpretation in Australia*, 5th ed., Butterworths, Sydney, 2001, p. 113.
197. *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1.
198. *ibid.*, p. 184.
199. *ibid.*, p. 256.
200. *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.
201. *ibid.*, p. 507 (emphasis added). See also Zines, op. cit., p. 24.
202. *ibid.*, p. 507.
203. Harris, op. cit., p. 114.
204. *Pidoto v Victoria* (1943) 68 CLR 87.
205. *ibid.*, pp. 119–20.
206. *ibid.*, p. 120.
207. T. Blackshield and G. Williams, *Australian Constitutional Law and Theory*, 3rd ed., Federation Press, Sydney, 2002, p. 739.
208. (1943) 68 CLR 87, p. 101.
209. T. Blackshield, 'Corporations power', *Oxford Companion to the High Court of Australia*, Oxford University Press, South Melbourne, 2001, p. 156.

210. Zines, op. cit., p. 25.
211. *ibid.*
212. Creighton and Stewart, op. cit., p. 114.
213. (1947) 74 CLR 31, p. 82.
214. (1995) 184 CLR 188.
215. *ibid.*, p. 231 (emphasis added).
216. *ibid.*, pp. 232, 234.
217. *ibid.*, p. 233.
218. *ibid.*, p. 230.
219. [*Victoria v Commonwealth*](#) (1996) 1987 CLR 416.
220. *ibid.*, p. 521.
221. *ibid.*; and see Creighton and Stewart, op. cit., p. 115.
222. Creighton and Stewart, op. cit., p. 115.
223. *State Owned Corporations Act 1989* (NSW), for example, ss. 7A, 20D, 21.
224. (1982) 150 CLR 282.
225. L. Zines, *The High Court and the Constitution*, 4th ed., Butterworths, Sydney, 1997, p. 87.
226. (1920) 28 CLR 129.
227. Joseph and Castan, op. cit., p. 45.
228. K. Booker, A. Glass, R. Watt, *Federal Constitutional Law, An Introduction*, 2nd ed., Butterworths, Sydney, 1998, p. 40.
229. D. Solomon, 'Federalism, impact of Court's decisions on', *Oxford Companion to the High Court of Australia*, op. cit., p. 276.
230. *ibid.*
231. Williams, op. cit., pp. 27, 5.
232. *Koowarta* (1982) 153 CLR 168, p. 227.
233. G. Craven, 'Is the IR legislation a federal offence?', *Australian Financial Review*, 28 October 2005, p. 3.
234. Blackshield and Williams, op. cit., p. 654.
235. W. J. Ford, '[Politics, the Constitution and Australian Industrial Relations: Pursuing a Unified National System](#)', *Australian Economic Review*, vol. 38, no. 2, June 2005, p. 220.
236. M. Priest, 'High Court challenge to Howard on IR', *Australian Financial Review*, 14 April 2005, p. 1.

237. 'WorkChoices a declaration of constitutional war on the states, says expert', *workplace express*, 2 November 2005.
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239. K. Booker, A. Glass, 'What Makes The Engineers Case a Classic?', in M. Coper, G. Williams (eds), *How Many Cheers for Engineers?*, Federation Press, Sydney, 1997, p. 63.
240. *ibid.*
241. *ibid.*
242. Booker, Glass and Watt, op. cit., p. 92.
243. *ibid.*, p. 93.
244. *Actors & Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169.
245. (1995) 183 CLR 323, p. 337.
246. Craven, 'Is the IR legislation a federal offence?', op. cit., p. 3.
247. Creighton and Stewart, op. cit., pp. 146–7.
248. *Burwood Cinema* (1925) 35 CLR 528; *Metal Trades Employers Association* (1935) 54 CLR 387; see *ibid.*, pp. 88 and 146.
249. *ibid.*, p. 147.
250. *ibid.*, p. 486.
251. *New South Wales v Commonwealth (the Incorporation Case)* (1990) 169 CLR 482.
252. *Jumbunna* (1908) 6 CLR 309, p. 361.
253. *Actors and Announcers Case* (1982) 159 CLR 169.
254. Constitution, s. 122.
255. Constitution, s. 52(1).
256. Creighton and Stewart, op. cit., pp. 405, 488.
257. *ibid.*, pp. 405–6.
258. Owens, op.cit., pp 20-21.
259. *New South Wales v Commonwealth* (1990) 169 CLR 482.
260. Creighton and Stewart, op. cit., pp. 116–18.
261. *Australian Capital Television* (1992) 177 CLR 106, *Nationwide News* (1992) 177 CLR 1 and *Lange* (1997) 189 CLR 520.
262. [*Bennett v President, Human Rights and Equal Opportunity Commission*](#) (2003) 204 ALR 119.
263. See Ian Holland and Peter Prince, '[Public Servants Speaking Publicly: the Bennett case](#)', *Research Note*, no. 31, Parliamentary Library, Canberra, 2003–04; Creighton and Stewart, op. cit., p. 117.

264. Creighton and Stewart, *op. cit.*, p. 117.
265. *Levy v Victoria* (1997) 146 ALR 248.
266. Williams, *op. cit.*, pp. 40–1.
267. Harris, *op. cit.*, pp. 105–6, based on *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, p. 143 (per Mason CJ).
268. *CEPU v Laing* (1998) 159 ALR 73.
269. *ibid.*, p. 92; and see Creighton and Stewart, *op. cit.*, p. 118.
270. Williams, *op. cit.*, pp. 41–2.
271. See summary of judicial support for an implied freedom of association in Justice McHugh’s judgment in *Mulholland v Australian Electoral Commission*, (2004) 209 ALR 582 at 615.
272. G. Craven, *Conversations with the Constitution*, *op. cit.*, p. 150.
273. (2004) 209 ALR 582.
274. *ibid.*, pp. 615 (McHugh) and 658 (Kirby).
275. See Justice Callinan (209 ALR 582, p. 673); and Justices Gummow and Hayne (p. 623), supported by Justice Heydon (p. 681).
276. *ibid.*, at 658.
277. *ibid.*
278. McCallum, ‘[Australian Constitution](#)’, *op. cit.*, p. 467.
279. ‘I’m not a centralist, says Howard’, *op. cit.*
280. DEWRSB, [The Case for Change](#), p. 63. And see DEWRSB, *Breaking the Gridlock: Towards a Simpler National Workplace Relations System*, [Discussion Paper 2: A new structure](#), Canberra, 2000, p. 25:

A new system could cover approximately 6.1 million of Australia’s 7.15 million (non-farm) employees (Table 1). This is about 85 per cent of the total population of (non-farm) employees.

In May 2005, there were some 365,000 people in the farming sector, or around 4 per cent of the total Australian workforce (source: Australian Bureau of Statistics, figures for ‘Agriculture, Forestry and Fishing’).
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297. Booker and Glass, *op. cit.*, p. 63.
298. McCallum, '[Australian Constitution](#)', *op. cit.*, p. 466.
299. Williams, '[The Constitution and a national industrial relations regime](#)', *op. cit.*, p. 510.

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