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***The Workplace Relations Case -
Implications for the States***

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Lenny Roth and Gareth Griffith

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EXECUTIVE SUMMARY

On 14 November 2006, the High Court handed down its long-awaited decision in the *Workplace Relations Case*. By a majority of 5:2, the Court rejected all of the challenges by the States and unions to the constitutional validity of the Federal Government's new workplace relations laws, which were passed in December last year.

The issue in the case

The principal issue was the Commonwealth's capacity to rely on the corporations power (s 51(xx)) in the Constitution to sustain the *Workplace Relations Amendment (Work Choices) Act 2005*. Section 51(xx) allows the Commonwealth to make laws 'with respect to' –

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

The majority judgment

The majority of the High Court, as constituted by Gleeson CJ and Gummow, Hayne, Heydon and Crennan JJ, rejected all the plaintiffs' challenges to the validity of the legislation. In coming to their decision:

- The majority rejected the argument that the power conferred by s 51(xx) is restricted to a power to regulate the dealings of constitutional corporations with persons external to the corporation, but not with employees.
- The majority also rejected the argument that s 51(xx) should be read down, or restricted in its operation, by reference to s 51(xxxv), which only allows the Commonwealth to make laws with respect to the conciliation and arbitration for the prevention and settlement of interstate industrial disputes.
- The majority seemed to adopt a very broad construction of the corporations power, one that holds that, as long as a law is addressed to foreign, trading or financial corporations, the Commonwealth can regulate any aspect of what that corporation does, including any relationship the corporation may have with a third party or its employees.

The minority judgments

Justices Kirby and Callinan held that the legislation was invalid because, in their view, the corporations power cannot be relied upon to enact laws regulating the industrial relations of corporations and their employees, which extend beyond the limitations of the conciliation and arbitration power in s 51(xxxv). Although it was not necessary for the minority judges to reach a conclusive view about the ambit of the corporations power generally, they indicated that they would not support the wide interpretation of the power adopted by the majority because it had the potential to greatly distort the nation's federal balance.

Implications of the decision for industrial relations

The High Court's decision means that the new Federal workplace relations laws are valid and they will continue to operate. With respect to the regulation of industrial relations:

- The NSW Government has recently enacted legislation to modify the coverage and impact of the new Federal laws. This includes legislation to allow unions and employers to operate outside the new Federal system by entering into a private agreement to refer disputes to the NSW industrial tribunal, legislation to ensure that public sector employees of statutory corporations are not covered by the new Federal system and legislation to introduce a safety net of minimum conditions and unfair dismissal remedies for child employees of corporations.
- The Federal Government is currently seeking to enact new laws relating to independent contractors. The proposed legislation would also use the corporations power in the Constitution to override provisions in State industrial laws relating to independent contractors. In the future, the Federal Government may also decide to rely on the corporations power to create national schemes of regulation in relation to occupational health and safety and workers compensation.

Implications for other areas of government responsibility

For many commentators, the High Court's adoption of a broad construction of the corporations power has implications that extend far beyond the specific field of industrial relations. In his dissenting judgment, Justice Kirby suggested potential areas for the expansion of Commonwealth power, including education, health, town planning, security and protective activities, local transport, energy, environmental protection, aged and disability services, land and water conservation, agricultural activities, corrective services, gaming and racing, sport and recreation services, fisheries and many Aboriginal activities. Justice Kirby stated: 'All of the foregoing fields of regulation might potentially be changed, in whole or in part, from their traditional place as subjects of State law and regulation, federal legal regulation, through the propounded ambit of the corporations power'.

Implications of the decision for Australian federalism

There are those in the business community and beyond who have welcomed the High Court's decision, saying it provides an opportunity for positive reform at the State level and for the adoption of a 'national' approach in several key areas of social and economic life. Others have been more critical. For Professor Greg Craven, the decision 'changes federalism and constitutionalism in this country from being determined by the constitution to really the political will of the Commonwealth'.

1. INTRODUCTION

On 14 November 2006, the High Court handed down its long-awaited decision in the *Workplace Relations Case*.¹ By a majority of 5:2, the High Court rejected all of the challenges by the States and unions to the constitutional validity of the Federal Government's new workplace relations laws, which were passed in December last year.² This paper presents a summary of the Court's decision and it considers the possible implications of the decision for the States in relation to industrial relations, other areas of government responsibility, and Australian federalism.

2. BACKGROUND

The new workplace relations laws have been discussed in two previous briefing papers. The first paper examined the Federal Government's attempt through the new laws to create a national system of workplace relations by extending the Federal workplace relations system to cover most corporations and their employees.³ The second paper reviewed the other major changes to the Federal system and the debate about those changes.⁴ To place the High Court case in context, this section provides a very brief summary of those two papers.

2.1 The situation before the 2005 changes

- Since early last century, Australia has had six State industrial relations systems as well as a Federal industrial relations system. The State systems have regulated the majority of employers and employees in each State while the Federal system has regulated a significant number of employers and employees in each State. As at 1990, State awards covered 47 per cent of employees in Australia while Federal awards covered 31 per cent of employees in Australia.⁵
- The reason why we have had both State and Federal systems is because the Federal Constitution gave the Federal Parliament a limited power in section 51(xxxv) 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". The limitations of this power include its restriction to *interstate* industrial disputes and the requirement to provide for the independent resolution of such disputes through a process of *conciliation and arbitration*. In reliance on this power, the Federal

¹ *NSW v Commonwealth; Western Australia v Commonwealth* [2006] HCA 52.

² See *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

³ Roth L 'Industrial Relations Reforms: The proposed national system', NSW Parliamentary Library Research Service, *Briefing Paper No. 11/05*, November 2005.

⁴ Roth L 'The New Federal Workplace Relations System', NSW Parliamentary Library Research Service, *Briefing Paper No. 2/06*, February 2006.

⁵ Australian Bureau of Statistics, *Award Coverage Australia*, ABS Cat No 6315.0, May 1990.

conciliation and arbitration system was established in 1904. The reach of this system expanded over the last century due to the willingness of some unions to manufacture interstate disputes to attract the jurisdiction of the Federal tribunal.

- The NSW and Federal systems have shared the same structure. Both have been based on compulsory conciliation and arbitration by industrial tribunals, in which unions have been active participants. The respective industrial tribunals have made awards setting minimum wages and conditions for employees in most industries and occupations. In the early 1990s, major changes were made to both the Federal and NSW systems, which placed an emphasis on the setting of wages and conditions through negotiation of agreements at the workplace level (workplace agreements) in place of industry-based awards made by the Federal and State tribunals. The NSW system has only allowed for the making of collective workplace agreements: ie agreements between an employer and a group of employees or unions representing a group of employees. Initially, the Federal system only allowed for the making of collective workplace agreements but in 1996 the Howard Government introduced changes that have allowed for the making of workplace agreements between an employer and an individual employee (known as AWAs).
- In the first half of last century, there were six unsuccessful referendums that attempted to give the Federal Parliament a general power to legislate in relation to industrial relations. The proposal to create a national system of industrial relations was considered in a 1985 report by the Hancock Committee, which was appointed by the Federal Government to undertake a comprehensive review of Australian industrial relations laws. The Committee explained that there were three possible options for achieving a national system. The first two options were to change the Constitution by referendum, or for the States to refer their powers over industrial relations to the Commonwealth. The Committee considered that it was unlikely that the necessary degree of consensus could be reached for either of these two options. A third possible option was for the Federal Government to use its other constitutional powers, such as the corporations power, to greatly extend the coverage of the Federal system to the exclusion of the State systems. The Committee recommended against this option for three main reasons: (i) there was some risk of invalidity; (ii) it would be divisive and strenuously opposed by State Governments, and (iii) there would be gaps in coverage. In 1988, the Constitutional Commission published its final report, which recommended that the Constitution be changed to give the Federal Parliament a general power to legislate in relation to industrial relations. No subsequent referendum has been held.
- In 1996, the Victorian Government referred its power over industrial relations to the Federal Government. Since then, the Federal system has operated exclusively in Victoria except in relation to aspects of public sector employment. No other State has referred its powers over industrial relations to the Federal Government. In the lead up to enacting its new workplace relations laws in 2005, the Federal Government invited the other States to refer their powers but the States declined.

- The corporations power, which is found in section 51(xx) of the Constitution, states that the Federal Parliament may make laws with respect to “foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth”. For most of the last century, this power was largely ignored as a basis for Federal legislation because a 1909 High Court decision had interpreted this power very narrowly. The High Court overturned that decision in 1971 and since then the Federal Government has relied on the corporations power to enact significant laws in a range of areas, including industrial relations. In 1977 the Fraser Government used the corporations power to outlaw secondary union boycott activities against corporations. Unfair contract provisions in the *Industrial Relations Act 1988* (Cth) were also largely based on the corporations power. The enterprise bargaining provisions enacted by the Keating Government in the early 1990s relied, in part, on the corporations power, and significant provisions in the Howard Government’s *Workplace Relations Act 1996*, including the AWA provisions, are also based on the corporations power. Some High Court cases that have previously considered the validity of industrial relations provisions based on the corporations power are discussed in a previous briefing paper.⁶

2.2 Summary of the 2005 changes

In December 2005, the Federal Government enacted new laws, which are largely based on the corporations power and which contain substantial changes to the regulation of industrial relations in Australia.⁷ The new laws came into force on 27 March 2006.

Extension of Federal system: The change that lies at the heart of the High Court challenge by the States is the extension of the Federal system of industrial relations to cover all foreign, trading and financial corporations and their employees.⁸ State industrial relations laws and industrial instruments (awards and workplace agreements) have been excluded from covering these corporations and their employees, except for certain State laws such as those regulating workers compensation, occupational health and safety, long service leave, child labour, and apprenticeships.⁹ The exclusion of the State systems is achieved by virtue of section 109 of the Constitution.¹⁰ The Federal Government estimated that the new Federal system covers up to 85 per cent of employees in Australia.

Changes to operation of Federal system: In addition to extending the coverage of the Federal system of industrial relations, the new laws also made major changes to the operation of the system. The main changes are:

⁶ See Roth L ‘Industrial Relations Reforms: The proposed national system’, note 3, p21-22.

⁷ See *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

⁸ See definition of employer and employee in *Workplace Relations Act 1996*, sections 5, 6.

⁹ See *Workplace Relations Act 1996*, sections 16, 17.

¹⁰ See Roth L ‘Industrial Relations Reforms: The proposed national system’, note 3, p23-24.

- *Dispute resolution:* The Federal system of compulsory conciliation and arbitration, which had existed for over 100 years, has been abolished. The Federal industrial tribunal (known as the Australian Industrial Relations Commission) is now only a voluntary dispute resolution body and parties can also agree to refer disputes to private dispute resolution services.
- *Setting of minimum wages:* Instead of being adjusted by the Australian Industrial Relations Commission, minimum wages in awards are now adjusted by a new body known as the Australian Fair Pay Commission. The Australian Fair Pay Commission adjusts wages according to different parameters than the Industrial Relations Commission and it undertakes research and consultation rather than arbitrating on competing claims by unions and employer bodies.
- *Minimum conditions:* There are new statutory minimum conditions in relation to maximum hours of work, annual leave, personal/carer's leave and parental leave. Minimum wages and these four minimum conditions make up the new Australian Fair Pay and Conditions (AFPC) Standard. Employees cannot receive lower wages or conditions than provided in the AFPC Standard.
- *Workplace agreements:* Prior to the reforms, under both the NSW and Federal systems, workplace agreements needed to pass the no-disadvantage test. An agreement would not pass that test if, on balance, it would result in a reduction in the overall conditions of employment of the employees concerned, compared against an applicable award and statutory minimum conditions. The new laws have abolished the no-disadvantage test and workplace agreements now only need to comply with the minimum wages and conditions in the AFPC Standard.
- *Industrial action:* Unions and employees cannot now take lawful industrial action when negotiating a workplace agreement unless this has been approved by a majority of employees, voting by secret ballot. In addition, the federal industrial tribunal can prevent industrial action from taking place if it is causing significant harm to a third party. The Minister now also has the power to stop industrial action that is threatening the economy or the health or safety of part of the population.
- *Unfair dismissals:* Unfair dismissal laws that were introduced into the NSW and Federal systems in the 1990s have allowed employees who have been dismissed to apply to the industrial tribunals on the grounds that their dismissal was harsh, unjust or unreasonable. Under the new Federal system, businesses that employ up to 100 employees are exempt from unfair dismissal laws. These employees remain covered by *unlawful* dismissal laws, which prohibit employers from dismissing employees for discriminatory reasons: for example, race, sex, or disability.

2.3 Debate about merits of the 2005 changes

This section summarises the debate about the merits of the changes. The next section discusses the separate debate about the constitutional validity of the changes and outlines

the way in which the High Court settled that debate.

Debate about extension of Federal system: The Federal Government and business groups argued that the extension of the Federal system was necessary because the system of overlapping Federal awards was too complex, costly and inefficient; and that in an age when our productivity must match that of global competitors, we can no longer afford to force Australian firms that operate nationally to comply with six different workplace relations systems. The State Governments and other critics have argued against the extension of the Federal system on the grounds that a national system should be achieved in consultation with the States rather than by hostile takeover, that the new Federal system is unfair (see below) and that the new system is still a dual system with some complexity.

Debate about changes to operation of Federal system: The Federal Government and business groups have argued that the changes to the operation of the Federal system will give employers and employees more choice and flexibility in setting their wages and employment conditions, which will lead to greater productivity and a stronger economy. They claim that the reforms will result in more jobs, higher wages and better living standards. Critics (which include trade unions, State Governments, many academics and welfare groups) have argued that the economic case for the changes has not been made out and that the new laws will tilt the balance of power too far in favour of employers. Critics claim that, over time, the changes will lead to lower wages and reduced working conditions, which will mean decreasing living standards and greater difficulty in balancing work and family life. They argue that the changes are likely to impact hardest on vulnerable workers, such as indigenous people, people with a disability and young people.

2.4 The High Court challenge

In December 2005, NSW launched an action in the High Court challenging the constitutional validity of the new Federal laws. The four other mainland States joined in this action as did Unions NSW and the Australian Worker's Union. Tasmania and the two Territories did not join in the action but intervened in the case in support of the other States. The basis for the challenge was that the corporations power does not support industrial relations laws of the kind that the Federal Government enacted. The case was heard in May 2006. The Court's decision was handed down on 14 November 2006.

3. THE HIGH COURT'S DECISION

3.1 The majority judgment

In the *Workplace Relations Case* the majority of the High Court, as constituted by Gleeson CJ and Gummow, Hayne, Heydon and Crennan JJ, rejected all the plaintiffs' challenges to the validity of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). The challenges and the grounds upon which they were rejected are summarised below.

The corporations power: The principal question in issue was the Commonwealth's capacity to rely on the corporations power (s 51(xx)) to sustain the legislation. That paragraph provides the Commonwealth with the power to make laws 'with respect to':

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

As explained by the majority, the constitutional basis for the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) is revealed by the definitions of ‘employee’ and ‘employer’ in ss 5 and 6 of that amending Act. The definition of ‘employee’ in s 5(1) is an individual who is employed by an ‘employer’ as defined by s 6(1) of the amending Act. The first limb of that definition in s 6(1) is that ‘employer’ means ‘a constitutional corporation, so far as it employs, or usually employs, an individual’. The term ‘constitutional corporation’ is defined to mean a corporation to which s 51(xx) of the Constitution applies.

External/internal relationships distinction- *The plaintiffs argued that the power conferred by s 51(xx) is restricted to a power to regulate the dealings of constitutional corporations with persons external to the corporation, but not with employees (or, apparently, prospective employees).*

This argument was based largely on the dissenting reasons of Isaacs J in the first corporation case to come before the High Court – *Huddart, Parker & Co Pty Ltd v Moorehead*¹¹ - where it was said that s 51(xx) ‘entrusts to the Commonwealth Parliament the regulation of the conduct of the corporations in their transactions with or as affecting the public’ (emphasis in original).¹² It was common ground in *Huddart Parker* that the Commonwealth did not have the power to create corporations, on the basis that the word ‘formed’ in s 51(xx) assumed that corporations were already in existence.¹³ Isaacs J identified State legislatures as responsible for the creation of a corporation, and classed these legislatures as having jurisdiction over all ‘internal administration’ necessary to produce ‘a corporation as a completely equipped body ready to exercise its faculties and capacities’.¹⁴ As the majority in the *Workplace Relations Case* commented, for Isaacs J ‘Questions of employment terms and conditions and questions about qualifications of directors were “purely internal management and equipment”’.¹⁵

The majority rejected the distinction between ‘external and internal relationships of corporations’ as a limit to the legislative power conferred by s 51(xx) ‘as an inappropriate and unhelpful distinction’.¹⁶ It was argued that the touchstone for Isaacs J was whether a corporation is ‘a completely equipped body ready to exercise its faculties and capacities’.¹⁷

¹¹ (1909) 8 CLR 330.

¹² (1909) 8 CLR 330 at 395.

¹³ This interpretation was confirmed in *NSW v Commonwealth* (1990) 169 CLR 482 (*the Incorporation case*).

¹⁴ (1909) 8 CLR 330 at 396.

¹⁵ [2006] HCA 52 at para 88.

¹⁶ [2006] HCA 52 at para 197.

¹⁷ [2006] HCA 52 at para 90.

The majority commented that this ‘seems to embrace the initial employment of employees but not any subsequent solicitation for, or engagement of, employees’. The distinction was ‘unhelpful’ therefore just as it was ‘unstable’, as shown by considering three ways in which a corporation could raise capital – ‘it seems that borrowing from a bank would be an “external” matter and issuing shares to existing shareholders would be an “internal” matter. But where would an issue of unsecured notes to the public or a public offering of shares sit in this taxonomy?’¹⁸ The distinction was further held to be ‘inappropriate’ in that it imported ‘notions of comity’ from choice of law rules, that is where a choice is to be made between the application of the laws of one jurisdiction and not another. Such notions do not apply to the interpretation of a federal constitution, it was said. This is because ‘comity assumes the legislative competence of each of the jurisdictions concerned and would have one jurisdiction give effect to rules whose content is prescribed by the law of the other jurisdiction’. In a federation, on the other hand, ‘the extent of the legislative power of the several integers of the federation is the very question that must be examined’.¹⁹ Summing up, the majority said the distinction between ‘external and internal relationships of corporations’ as a limit to the legislative power conferred by s 51(xx) finds ‘no reflection in the Convention Debates or the drafting history of s 51(xx) and, in any event, is unstable’.²⁰

Characterisation/construction of s 51(xx) - Alternatively, the plaintiffs submitted that a relatively narrow construction should be adopted in respect to s 51(xx), to the effect that laws affecting constitutional corporations must be confined to the regulation of matters peculiar to such corporations, namely, matters going to peculiarly corporate characteristics along with the engagement of foreign, trading and financial corporations in trading or financial (broadly business) activities²¹. It was argued that the mere fact that legislation operates on or by reference to such corporations is not sufficient.

This submission was based on various formulations found in the relevant case law relating to the characterisation of s 51(xx).²² It was submitted that it is insufficient for a law to be characterised as a law with respect to constitutional corporations that the law confers rights and or imposes obligations on them. If a positive test is to be adopted, the preferred test was said to be a ‘distinctive character test’ – that the nature of the corporation is significant as an element in the nature or character of the laws. The test was said to be: ‘the fact that the corporation is a foreign, trading or financial corporation should be significant in the

¹⁸ [2006] HCA 52 at para 90.

¹⁹ [2006] HCA 52 at para 94.

²⁰ [2006] HCA 52 at para 197.

²¹ [2006] HCA 52 at para 64. As the majority explained: ‘That is essentially a way of saying that “the nature of the corporation to which the laws relate must be significant as an element in the nature or character of the laws”, or “the fact that a law binds constitutional corporations does not make it law upon the subject of constitutional corporations unless the personality of the persons bound is a significant element of the law itself, or that the law must discriminate by reference to the relevant character of the corporations in question” (notes omitted).

²² A summary of recent case law is presented in Briefing Paper No 11/2005, pp 20-22.

way in which the law relates to it' if the law is to be valid.²³ This followed the views expressed by Dawson J in *Re Dingjan*,²⁴ to the effect that, before a law may be said to be with respect to constitutional corporations 'the way in which the law operates upon them must be such that they impart their character to the law...the fact that it is a trading or financial corporation should be significant in the way in which the law relates to it'.²⁵

This approach to characterisation in respect of s 51(xx) was not adopted by the majority in the *Workplace Relations case*. A broader construction of the paragraph was preferred. Specifically, the views of the minority (Mason CJ, Deane and Gaudron JJ) in *Re Dingjan* were emphatically endorsed.²⁶ Particular attention was paid to the judgment of Gaudron J, as well as to the amplification of her views in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union*²⁷ where she said:

I have no doubt that the power conferred by s 51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.²⁸

After quoting this observation with approval, the majority in the *Workplace Relations Case* concluded:

This understanding of the power should be adopted. It follows, as Gaudron J said, that the legislative power conferred by s 51(xx) 'extends to laws prescribing the

²³ [2006] HCA 52 at para 140.

²⁴ (1995) 183 CLR 323. For an overview of the case see – G Craven, 'Industrial relations, the Constitution and Federalism' (2006) 29(1) *UNSW Law Journal* 203.

²⁵ (1995) 183 CLR 323 at 346.

²⁶ The majority stated: 'The dissenting members of the Court in *Re Dingjan*, Mason CJ, Deane and Gaudron JJ, took a view of the reach of s 51(xx) wider than that of the majority. Particular reference need now be made only to the reasons of Gaudron J (with which Deane J agreed). Her Honour's reasoning proceeded by the following steps. First, the business activities of corporations formed within Australia signify whether they are trading or financial corporations, and the main purpose of the power to legislate with respect to foreign corporations must be directed to their business activities in Australia. Second, it follows that the power conferred by s 51(xx) extends "at the very least" to the business functions and activities of constitutional corporations and to their business relationships. Third, once the second step is accepted, it follows that the power "also extends to the persons by and through whom they carry out those functions and activities and with whom they enter into those relationships"' (notes omitted).

²⁷ (2000) 203 CLR 346.

²⁸ [2006] HCA 52 at para 178; quoting (2000) 203 CLR 346 at 375 [para 83].

industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations'.²⁹

The majority seemed to adopt a very broad construction of the corporations power, one that holds that, as long as a law is addressed to a constitutional corporation, the Commonwealth can regulate any aspect of what that corporation does, including any relationship the corporation may have with a third party or its employees.³⁰

The conciliation and arbitration power – *The plaintiffs also submitted that s 51(xx) should be read down, or restricted in its operation, by reference to s 51(xxxv). That paragraph confers on the Commonwealth Parliament the power 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".*

Various formulations of this argument were presented. As elucidated in the dissenting judgment of Kirby J, its main thrust was that, while the broad or 'ample' approach to the interpretation of the meaning of the heads of legislative power in s 51 of the Australian Constitution is well settled, that approach is subject to a qualification that derives from the requirement to construe the Constitution 'as one coherent instrument of government'.³¹ As a result of this, it was argued, the scope of certain heads of power must be construed in the light of 'safeguards, restrictions or qualifications' found in others.³² In effect, restrictions or limitations in some paragraphs require other heads of power to be read down accordingly. In *Bourke v NSW*³³ the relationship between the 'State banking power' (s 51(xiii)) and s

²⁹ [2006] HCA 52 at para 178.

³⁰ This summary draws on an earlier formulation by Professor George Williams of a broad construction of the corporations power, outlined in a speech delivered at the *Fair Go or Anything Goes?* Conference, Sydney, 13 July 2005. Callinan J commented that the majority had apparently accepted the 'object of command test', that is, any law taking the form 'a constitutional corporation shall...' or 'shall not' - [2006] HCA 52 at para 897. In respect to this test, the majority's views were expressed in the context of rejecting the claim made by the plaintiffs that the 'tests of distinctive character or discriminatory operation' must be understood 'as inserting a new or different filter into the process of characterisation' (para 198). The plaintiffs maintained that 'a law is not a law with respect to constitutional corporations unless it not only has a discriminatory operation (in the sense of singling out constitutional corporations as the object of command) but also is "substantially or relevantly connected with" some other "notable feature" which attaches to constitutional corporations' (para 266). For the majority, it was sufficient that the impugned provisions of a law 'either single out constitutional corporations as the object of statutory command (and in that sense have a discriminatory operation) or, like the legislation considered in *Fontana Films*, are directed to protecting constitutional corporations from conduct intended and likely to cause loss or damage to the corporation' (para 198). This reasoning was subsequently applied to the analysis of the relationship between s 51(xx) and particular provisions of the legislation, with the majority confirming that, to have 'discriminatory operation', it was sufficient for a provision to 'single out constitutional corporations as the object of the statutory command' (see, for example, paras 246, 249, 258 and 266).

³¹ [2006] HCA 52 at para 491.

³² This formulation is based on *Attorney General v Schmidt* (1961) 105 CLR 361 at 371-372.

³³ (1990) 170 CLR 276.

51(xx) was considered, with the Court unanimously accepting that the words of limitation – ‘other than State banking’ – in s 51(xiii) impose a restriction upon federal legislative power as this applies to ‘financial corporations’. As Kirby J said ‘By analogy, the plaintiffs invoke a similar approach to the available federal legislative powers in issue in the present proceedings, namely pars (xx) and (xxxv) of s 51’.³⁴

In rejecting this submission, the majority pointed out that in *Bourke v NSW* the relevant test was whether ‘the second subject-matter with respect to which the law can be characterized is not only outside power *but is the subject of a positive prohibition or restriction*’ (emphasis added).³⁵ It was the majority’s view that s 51(xxxv) does not contain a ‘positive prohibition or restriction’, of particular or general application, that would require s 51(xx), or indeed any other paragraphs in s 51, to be construed as subject to the limitation. The majority judgment stated:

Paragraph (xxxv) is to be read as a whole; it does not contain any element which answers the description in *Bourke* of a positive prohibition or restriction upon what otherwise would be the ambit of the power conferred by that paragraph. Accordingly, there does not arise the further question addressed in *Bourke*, namely, whether other paragraphs of s 51, in particular par (xx), are to be construed subject to a positive prohibition or restriction found elsewhere, and, in particular, in s 51(xxxv).³⁶

Further, it was pointed out that previous High Court cases had upheld the validity of laws regulating industrial relations, under other heads of power, notably the defence power, in a fashion other than as required by s 51(xxxv). Reference was made to *Pidoto v Victoria*,³⁷ with the majority stating that ‘The decision in that case necessarily denied the proposition that the defence power is limited by par (xxxv)’.³⁸ Further reference was made to a passage from the decision of Gleeson CJ in *Re Pacific Coal*,³⁹ expressly adopting the principles of

³⁴ [2006] HCA 52 at para 498. For Kirby J, s 51(xxxv) authorises federal legislation on industrial disputes but subject to two ‘safeguards, restrictions or qualifications’ – (a) the federal legislation must have the character of interstateness and (b) it must also provide for the means of independent resolution. In the view of Kirby J ‘The Federal Parliament does not enjoy a more general power to make laws with respect to industrial disputes. It cannot do so by purporting to invoke another, less specific, head of power’ (para 510).

³⁵ [2006] HCA 52 at para 219; quoting (1990) 170 CLR 276 at 285. But note that the Full Court in *Bourke* referred approvingly to Dixon J’s formulation in *Attorney General v Schmidt - Workplace Relations Case* (para 205). In fact, the Full Court in *Bourke* went so far as to describe Dixon J’s statement as ‘The general principle applicable in a case such as the present...’ (at 285-286)

³⁶ [2006] HCA 52 at para 221.

³⁷ (1943) 68 CLR 87.

³⁸ [2006] HCA 52 at para 227.

³⁹ (2000) 203 CLR 346 at para 29.

interpretation applied in *Pidoto*, a passage which the majority said ‘now also should be accepted and followed’.⁴⁰

Exclusivity of industrial disputes power – *Alternatively, the plaintiffs argued that, even if the presence of s 51(xxxv) did not affect the general ambit of s 51(xx), at least it operated to restrict the capacity of the Parliament to enact a law that can be characterised as a law with respect to the prevention and settlement of industrial disputes.*

The reasoning of the majority, as set out above, left little or no scope for the development of this further argument. It was pointed out that, in *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc*,⁴¹ the High Court upheld the validity of laws pertaining to the relationship between employers and maritime employees, ‘so far as they were supported by s 51(i) of the Constitution’ [the trade and commerce power]. The view of the majority in the present *Workplace Relations Case* was encapsulated in the statement:

The course of authority in this Court denies to par (xxxv) a negative implication of exclusivity which would deny the validity of laws with respect to other heads of power which also had the character of laws regulating industrial relations in a fashion other than as required by par (xxxv).⁴²

Federal balance - *Underlying these and other arguments was ‘the federal balance’ issue, by which the plaintiffs contended that there is a need to confine the operation of the corporations power because of its potential effect upon the (concurrent) legislative authority of the States.*

This was set aside briskly enough by the majority. No party, it was said, ‘sought to challenge the approach to constitutional construction that underpinned the decision in the *Engineers’ Case* to reject the doctrine of implied immunities and the doctrine of reserved powers’.⁴³ With these two doctrines still intact, the nub of what remains of the ‘federal balance’ argument was articulated by Dixon J in *Melbourne Corporation v The Commonwealth*, where it was said that the Constitution predicates the ‘continued existence as independent entities’ of ‘a central government and a number of State governments separately organized’.⁴⁴ The majority elaborated on this as follows:

And because the entities, whose continued existence is predicated by the Constitution, are polities, they are to continue as separate bodies politic each having legislative, executive and judicial functions. But this last observation does

⁴⁰ [2006] HCA 52 at para 228.

⁴¹ (2003) 214 CLR 397.

⁴² [2006] HCA 52 at para 223.

⁴³ [2006] HCA 52 at para 190.

⁴⁴ (1947) 74 CLR 31 at 82. See also *Austin v The Commonwealth* (2003) 215 CLR 185.

not identify the content of any of those functions. It does not say what those legislative functions are to be.⁴⁵

Moreover, it was pointed out that Dixon J observed in *Melbourne Corporation* that the framers ‘appear...to have conceived the States as bodies politic *whose existence and nature are independent of the powers allocated to them*’ (emphasis added).⁴⁶ For the majority, the fact that the ‘separate polities’ doctrine does not specify legislative functions and, indeed, conceives of the States as bodies politic in isolation from their powers, places the very idea of a ‘federal balance’ on highly restrictive grounds. The majority stated that ‘the proposition, that a particular construction of s 51(xx) would or would not impermissibly alter the federal balance, must have content’.⁴⁷ In the majority’s view, the plaintiffs failed to provide that ‘content’. To succeed, it seems, they would have had to establish that, by the expansion of the corporations power, ‘the States could no longer operate as separate governments exercising independent functions’, a proposition the plaintiffs did not seek to advance.⁴⁸

Failed referendums – *Queensland submitted that successive referendums to broaden the scope of the corporations power and to confer on the Commonwealth a general industrial relations power had all failed. It was further submitted that this rejection by the people is a ‘powerful aid in construing the Constitution’.*⁴⁹

These propositions were dismissed by the majority, arguing that: there may be no ‘equivalence’ between the questions put at referendum and those that now fall for determination;⁵⁰ and that referendums fail for a whole range of reasons, including ones connected to party politics.⁵¹ Besides, it was said, what really is the implication of a failed referendum for the meaning of the Constitution? The majority asked ‘is the rejection of the proposal to be taken as confirming what is and always has been the meaning of the Constitution, or is it said that it works some change of meaning?’⁵² The majority was adamant that responsibility for elucidating the meaning of the Constitution is given exclusively to the High Court which, to the exclusion of extraneous considerations, is to treat the constitutional text ‘as the one instrument of federal government’.⁵³

⁴⁵ [2006] HCA 52 at para 194.

⁴⁶ (1947) 74 CLR 31 at 82.

⁴⁷ [2006] HCA 52 at para 196.

⁴⁸ [2006] HCA 52 at para 196.

⁴⁹ [2006] HCA 52 at para 125.

⁵⁰ [2006] HCA 52 at para 131.

⁵¹ [2006] HCA 52 at para 132.

⁵² [2006] HCA 52 at para 132.

⁵³ [2006] HCA 52 at para 134.

Other challenges to the legislation: Among the other particular challenges to the Commonwealth's *Workplace Relations Amendment (Work Choices) Act 2005* were arguments, in various forms, to the effect that the exclusion of State (and Territory) industrial laws under s 16 of the Act were invalid. It is enough to say that all these challenges to the validity of s 16 failed.

A further particular challenge related to the regulation making powers in s 356, s 846(1) and other provisions of the legislation, basically on the ground that the powers in question were 'impermissibly vague and devoid of content'.⁵⁴ Section 356 provides 'The regulations may specify matters that are *prohibited content* for the purposes of this Act'; s 846(1) is a general regulation making power, granting the Governor-General the power to make regulations, 'not inconsistent with this Act'. For the majority, 'the technique' employed in s 356, by which the Executive is provided with a wide discretion to define what constitutes 'prohibited content' for the purposes of the legislation, 'is an undesirable one which ought to be discouraged'.⁵⁵ However undesirable it may be, s 356 was still held to be constitutionally valid. For Kirby J, on the other hand, writing in dissent, the AWU's submission went to the heart of the relationship between Parliament and the Executive. Taking this opportunity to criticise the 'indulgent approach of the majority' to the legislation as a whole, he stated:

The impugned provisions border on an endeavour to enact an abdication of the Parliament's responsibilities. This Court should say so and forbid it.⁵⁶

3.2 The minority judgments

Justices Kirby and Callinan held that the legislation was constitutionally invalid. Their Honours gave separate reasons but essentially came to the same conclusion. According to Justices Kirby and Callinan, the corporations power in s 51(xx) cannot be relied upon to enact laws regulating the industrial relations of corporations and their employees, which extend beyond the limitations of the conciliation and arbitration power in section 51(xxxv).⁵⁷ Justice Kirby stated his interpretation of the Constitution as follows:

In my view, the power afforded to the Federal Parliament by s 51(xx) of the Constitution must be read together with that afforded by s 51(xxxv). Where, properly analysed, the law under challenge is not a law with respect to corporations but is to be characterised as a law with respect to the prevention and settlement of industrial disputes, it must conform to the [limitations] stated for federal laws on that subject in par (xxxv). To the extent that [a law] is to be so [characterised] and

⁵⁴ This formulation of the AWU's submission belongs to Kirby J - [2006] HCA 52 at para 460(3).

⁵⁵ [2006] HCA 52 at para 399.

⁵⁶ [2006] HCA 52 at para 460(3).

⁵⁷ The limitations are noted above on p1.

does not conform to such [limitations], it is constitutionally invalid.⁵⁸

Justice Kirby held that the main provisions of the laws under challenge were properly characterised as being laws with respect to the prevention and settlement of industrial disputes and that the laws did not conform to the limitations in par 51(xxxv).⁵⁹

Although it was not necessary for the minority judges to come to a conclusive view about the scope of the corporations power generally (that is to say, outside the area of industrial relations)⁶⁰, Justices Kirby and Callinan indicated that they would not support the wide interpretation of the corporations power adopted by the majority because it had the potential to greatly distort the nation's federal balance.⁶¹ Their comments on the potential implications of the majority decision for the States are outlined in the next section.

4. IMPLICATIONS OF THE DECISION FOR THE STATES

4.1 Implications for industrial relations

The High Court's decision means that the new Federal workplace relations laws are valid and they will continue to operate. This may change if Labor wins the next Federal election.⁶² An earlier briefing paper outlined the coverage of the new Federal laws, the main changes arising out of these new laws, and the effect of these changes on employees in NSW who move into the Federal system.⁶³ In relation to coverage, one continuing issue is whether certain types of corporations will be regarded as constitutional corporations (i.e. as "trading" or "financial" corporations); the recent High Court case did not deal with this issue and further litigation may arise.⁶⁴ This section looks at:

- Legislation enacted by the NSW Government in response to the new Federal laws.
- Other industrial laws that the Federal Government might enact.
- Whether the States will continue to operate their own industrial relations systems.

⁵⁸ [2006] HCA 52 at para 583.

⁵⁹ [2006] HCA 52, at paras 584 to 604. See Justice Callinan's similar conclusion at para 913.

⁶⁰ [2006] HCA 52 at para 545 (per Kirby J) and at para 892 (per Callinan J).

⁶¹ [2006] HCA 52 at paras 537 to 544 and para 614 (per Kirby J) and paras 793 to 797 (per Callinan J). Note also that at para 892 Callinan J expresses a tentative view about the scope of the corporations power generally.

⁶² The Federal Opposition Leader, Hon Kim Beazley MP, has said that he would overturn the new Federal laws if the Labor party were elected to government. See 'Labor to make poll IR struggle', *The Australian Financial Review*, 15/11/06, p14.

⁶³ See Roth L 'The New Federal Workplace Relations System', note 2. Note that the coverage of the new Federal system is outlined in that paper at p11-12.

⁶⁴ See 'Area of doubt remains', *The Australian Financial Review*, 15/11/06, p15.

Legislation enacted by NSW Government in response to new Federal laws: In March 2006, the NSW Government introduced two pieces of legislation. The *Industrial Relations Amendment Act 2006* allows unions and employers to operate outside the Federal workplace relations system by entering into a private agreement (known as a Referral Agreement) that provides for an industrial dispute (eg about conditions of employment) to be resolved by the NSW Industrial Relations Commission.⁶⁵

The *Public Sector Employment Legislation Amendment Act 2006* transformed employees of certain statutory corporations in NSW into direct employees of the NSW Government in order to prevent the new Federal workplace relations system from applying to these employees.⁶⁶ The Government stated this would ensure “the continued application of the State industrial relations system for key front-line employees, such as nurses, ambulance staff, TAFE teachers and support staff, home care workers, and other employees of statutory corporations”.⁶⁷ The Government stated that its legislation would apply to “every area health service and 51 public sector bodies totalling 186,000 frontline staff”.⁶⁸ It noted that about 45 per cent of the public sector were already employed directly by the Government and were therefore not covered by the new Federal system: this included school teachers and support staff, police, firefighters, and other Crown employees.⁶⁹

It is relevant to note that *Public Sector Employment Legislation Amendment Act 2006* does not apply to the employees of State-owned corporations. In budget estimates hearings on 1 September 2006, Minister Della Bosca explained that State-owned corporations would be able to operate outside the new Federal system by entering into Referral Agreements, as provided for in the *Industrial Relations Amendment Act 2006* (see above).⁷⁰ The Minister said that, “the vast majority of State-owned corporations and their boards have now entered into, or are in the process of entering into, relevant agreements with [their] work forces”.⁷¹ As at 12 September 2006, seven State-owned corporations had entered into agreements, one was close to entering into an agreement, three had been approached by unions to make an agreement, and eight others had not entered into an agreement.⁷²

⁶⁵ See new section 146A of *Industrial Relations Act 1996* (NSW). The amendment Act also contained provisions in relation to State enterprise consent awards applicable to corporations and in relation to conditions for outworkers employed by corporations.

⁶⁶ As direct employees of the NSW Government they would not be employed by a “trading” or “financial” corporation and would therefore not be covered by the new Federal system.

⁶⁷ Hon John Watkins MP, *NSW Parliamentary Debates*, 7/3/06, p21,148ff

⁶⁸ Hon Morris Iemma MP, *NSW Parliamentary Debates*, 7/3/06, p21108.

⁶⁹ Hon John Watkins MP, *NSW Parliamentary Debates*, 7/3/06, p21,148ff

⁷⁰ NSW Parliament, General Purpose Standing Committee No. 1, *Examination of Proposed Expenditure for the Portfolio Areas of Industrial Relations, Commerce and Finance: Transcript*, 1 September 2006, p48.

⁷¹ *Ibid*, p48.

⁷² NSW Parliament, General Purpose Standing Committee No. 1, *Examination of Proposed Expenditure for the Portfolio Areas of Industrial Relations, Commerce and Finance:*

On 24 October 2006, the NSW Government introduced two further industrial relations bills into Parliament. Both were passed on 15 November 2006.

The *Industrial Relations Further Amendment Bill 2006* aims to ensure that protections in the *Industrial Relations Act 1996* (NSW) in relation to the dismissal of injured workers and workers who make occupational health and safety complaints will continue to operate for employees in NSW who are in the new Federal workplace relations system. These provisions rely on the fact that the new Federal laws do not seek to override State laws dealing with workers compensation or occupational health and safety.⁷³ The bill will also allow the NSW Industrial Relations Commission to convene joint sittings with other State and Territory industrial tribunals, in order to “provide an effective alternative avenue to achieve consistent, sustainable wage increases and the consideration of the development of new national community standards through test case proceedings”.⁷⁴

The *Industrial Relations (Child Employment) Bill 2006* will introduce a safety net of minimum conditions and unfair dismissal remedies for employees under the age of 18. This legislation relies on the fact that the new Federal laws do not seek to override State laws relating to child labour.⁷⁵ In relation to the safety net, the Government explained that:

...the minimum conditions defined in the bill apply to child employees who enter into an individual or collective Federal workplace agreement or when wages and conditions of employment are set by a common law contract of employment and the child is employed by a constitutional corporation. These new Federal instruments are no longer tested for a disadvantage or detriment and are, therefore, liable to result in a child missing out on important protections. The bill’s effect is to reintroduce a safety net. ...An affected employer must provide at least the minimum conditions of employment contained in a comparable State award and the legislation that would have applied if that child were covered by that State award.⁷⁶

Other industrial laws that the Federal Government might enact: On 22 June 2006, the Federal Government introduced into Parliament the Independent Contractors Bill 2006 and the Workplace Relations Amendment (Independent Contractors) Bill 2006. The Government stated that this legislation is based on the principle that “genuine independent contracting relationships should be governed by commercial not industrial law”. Accordingly, the new laws will use the corporations power in the Constitution to override provisions in State industrial laws that deem certain classes of independent contractors to be employees. However, they will not override State protections for outworkers and for owner-drivers (although the Federal Government will review State regulation of owner-

Response to questions on notice from hearing on 1 September 2006.

⁷³ See *Workplace Relations Act 1996* (Cth), s 16(3)(b), (c).

⁷⁴ Hon David Campbell MP, *NSW Parliamentary Debates*, 24/10/06, p3289ff.

⁷⁵ See *Workplace Relations Act 1996* (Cth), s 16(3)(e).

⁷⁶ Hon David Campbell MP, *NSW Parliamentary Debates*, 24/10/06, p3289ff.

drivers in 2007).⁷⁷ The bill will provide civil penalties for ‘sham contracting arrangements’, namely where “an employer seeks to avoid taking responsibility for the legal entitlements due to employees by seeking to disguise as an independent contracting relationship what is in reality an employment relationship”.⁷⁸ The bill will also use the corporations power to override State unfair contract laws.⁷⁹ Federal unfair contract laws will operate instead. A Senate Committee reported on the bill in August 2006.⁸⁰ The bill has passed the House of Representatives but (as at 24 November 2006) had not yet passed the Senate.⁸¹

What other aspects of industrial relations would the Federal Government seek to regulate in the future? Graeme Orr, an associate professor in labour and constitutional law at Griffith University, has commented that the Federal Government:

...can also move to deregulate swathes of employment law so far left untouched by Work Choices, such as occupational health and safety. It might even intervene in the running of incorporated but state-owned Work-Cover insurers. The common law obligations of corporations for workplace injury, and for tort law more generally, could be rewritten to make them even less burdensome for business.⁸²

In relation to occupational health and safety, an article in *The Australian* in April 2006 reported that the Howard Government had “Australia’s spaghetti soup of workplace safety laws in its sights” following a report on red tape by the Productivity Commission earlier in the month. The article questioned how far the Howard Government would be willing to go in unifying and nationalising OH&S legislation, having regard to the controversial reaction to its Work Choices legislation. The article reported on recent developments:

Last month, federal Workplace Relations Minister Kevin Andrews quietly extended OHS cover to all companies that joined Comcare – the commonwealth’s workers compensation plan – while simultaneously immunising them against state-based laws. But this recourse is only available to Australia’s largest companies.

Meanwhile, Andrews has been pushing the states on OHS via the Australian Safety

⁷⁷ Hon Kevin Andrews MP, *Australian Parliamentary Debates*, 22/6/06. p8.

⁷⁸ Hon Kevin Andrews MP, *Australian Parliamentary Debates*, 22/6/06. p8.

⁷⁹ In NSW, the unfair contract provisions in Part 9 of the *Industrial Relations Act 1996* (NSW) allow the NSW Industrial Relations Commission to declare void, or vary, unfair contracts that relate to the performance of work in any industry.

⁸⁰ Senate Employment, Workplace Relations and Education Legislation Committee, *Provisions of Independent Contractors Bill 2006; Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*, Parliament of Australia, August 2006.

⁸¹ For a recent article on the *Independent Contractors Bill* see Riley J, ‘A fair deal for the entrepreneurial worker? Self-employment and independent contracting post Work Choices’, (2006) 19(3) *Australian Journal of Labour Law* 246.

⁸² ‘Court gives Howard the whip hand’, *The Australian Financial Review*, 15/11/06, p67.

and Compensation Council. The aim has been to achieve a single set of safety standards, even if we cannot achieve a single set of laws governing breaches of those standards.

But it is well known Andrews is growing impatient with lack of progress.

“There is no Australian government agenda to set up a national workers compensation scheme”, he says. “However, as I have stated publicly on a number of occasions, the demand for national consistency in workers compensation and OHS is gathering ever more impetus because, in a country with a work force of 10 million, it does not make sense for multi-state employers to have to deal with up to eight quite distinct and disparate jurisdictions”.⁸³

On 18 July 2006, the NSW Government suspended negotiations with the Federal Government on national workplace safety laws because it was concerned that the Federal Government’s approach would lead to a substantial deterioration in safety standards.⁸⁴

Will States continue to operate their own industrial relations systems? Following the High Court’s decision, State industrial relations Ministers indicated that they would continue to operate their own industrial relations systems and that they were considering “new legal options to circumvent the Work Choices legislation and bring more workers into their jurisdiction”.⁸⁵ On the other hand, business groups have predicted that the State industrial relations systems “could disappear by the end of the decade”.⁸⁶ Peter Anderson, from the Australian Chamber of Commerce and Industry, stated:

NSW will not be able to justify continuing to spend \$60 million or \$70 million of taxpayers money on an industrial relations system, with all of its infrastructure, all of its judges, all of its courts and all of its processes, where that system is simply applying to 10 or 20 per cent of the workforce.⁸⁷

Given their views about the unfairness of the new Federal laws, it is extremely unlikely that the NSW Government or any of the other State Governments will refer their powers over industrial relations to the Federal Government. The NSW Liberal party has previously indicated that it would do so if it were elected to government.⁸⁸

⁸³ ‘Unsafe practices’, *The Australian*, 26/4/06.

⁸⁴ ‘NSW suspends talks over workplace safety’, *Sydney Morning Herald*, 18/7/06.

⁸⁵ ‘Business tips one IR system in 10 years’, *The Australian Financial Review*, 15/11/06, p10.

⁸⁶ ‘Business tips one IR system in 10 years’, *The Australian Financial Review*, 15/11/06, p10.

⁸⁷ ‘Business tips one IR system in 10 years’, *The Australian Financial Review*, 15/11/06, p10.

⁸⁸ See ‘Brogden vows to hand IR to Canberra’, *The Australian Financial Review*, 12/4/05.

4.2 Implications for other areas of government responsibility

For many commentators, the High Court's adoption in the *Workplace Relations Case* of a broad construction of the corporations power has implications that extend far beyond the specific field of industrial relations. For the South Australian Premier, Mike Rann, the decision will allow the Commonwealth to use the corporations power 'to essentially take over what they like in the States'.⁸⁹ The Prime Minister, on the other hand, sought to dampen such speculation by stating:

We will not interpret this decision as being any kind of constitutional green light to legislate to the hilt. We have no desire to extend Commonwealth power except in the national interest. I have no desire for takeover's sake, to take over the role of the States. The only occasions when I support the use of Commonwealth power to extend its role and influence are where it is clearly for the benefit of all the Australian people.⁹⁰

On the opposing side of the debate, Greg Craven, the Executive Director of the John Curtin Institute of Public Policy, was in no doubt that the Commonwealth will want to use its newfound power at some stage, stating 'It's a little bit like saying knives in the hands of muggers are only dangerous if you stab with them'.⁹¹ Exactly how and why the Commonwealth may seek to use the corporations power to encroach on the States has been the subject of extensive commentary, starting with the dissenting judgments of Justices Kirby and Callinan.

Justice Kirby's reasoning: In his dissenting judgement, Kirby J argued that the broad interpretation of the corporations power advocated by the Commonwealth and supported by the majority 'will have profound consequences for the residual legislative and governmental powers of the States'. This would be due in large part, he argued, to

the enormous expansion in Australia in the number, variety and activities of the foreign and trading corporations described in s 51(xx), including in the outsourcing and privatisation in Australia today in the delivery of many governmental or formerly governmental services.⁹²

⁸⁹ 'High noon for the States', *SMH*, 15 November 2006 - <http://www.smh.com.au/news/national/high-noon-for-the-states/2006/11/14/1163266550361.html>

⁹⁰ 'High Court rules WorkChoices lawful', *PM*, Transcript, 14 November 2006 - <http://www.abc.net.au/pm/content/2006/s1788625.htm>

⁹¹ 'High Court decision paves way for greater federal control', *PM*, Transcript, 14 November 2006 - <http://www.abc.net.au/pm/content/2006/s1788644.htm>

⁹² [2006] HCA 52 at para 451.

Adding substance to this critique, Kirby J went on to say:

The States, correctly in my view, pointed to the potential of the Commonwealth's argument, if upheld, radically to reduce the application of State laws in many fields that, for more than a century, have been the subject of the State's principal governmental activities. Such fields include education, where universities, tertiary colleges and a lately expanding cohort of private schools and colleges are already, or may easily become, incorporated. Likewise in healthcare, where hospitals (public and private), clinics, hospices, pathology providers and medical practices are, or may readily become, incorporated. Similarly, with the privatisation and outsourcing of activities formerly conducted by State governments, departments or statutory authorities, through corporatised bodies now providing services in town planning, security and protective activities, local transport, energy, environmental protection, aged and disability services, land and water conservation, agricultural activities, corrective services, gaming and racing, sport and recreation services, fisheries and many Aboriginal activities. All of the foregoing fields of regulation might potentially be changed, in whole or in part, from their traditional place as subjects of State law and regulation, federal legal regulation, through the propounded ambit of the corporations power.⁹³

Justice Callinan's reasoning: Likewise, Callinan J emphasised the 'enormous' potential reach of the corporations power, stating:

The extent to which corporations and their activities pervade the life of the community can be gleaned from the numbers quoted in the explanatory memorandum and to which the joint judgment refers. The reach of the corporations power, as validated by the majority, has the capacity to obliterate the powers of the State, hitherto unquestioned.⁹⁴

In particular, Callinan J argued that the majority's decision could result in a concentration of power by the regulation of any class of persons, including any trade or profession, through whom a corporation may act. He explained:

The joint reasons hold that because the Act regulates or affects the relationship between corporations and a class of those through whom those corporations may act, it is constitutionally valid. If that is correct, the opportunities for further central control are very numerous. It is not difficult to foresee legislation seeking, for example, to control, wholly or at least partly, subcontractors to corporations, or the solicitors or barristers who act for a corporation, or anyone else who deals with, purchases from or sells to a corporation, or has any form of financial, or indeed any other, relationship with a corporation, insofar as it touches or concerns a corporation.⁹⁵

⁹³ [2006] HCA 52 at para 539.

⁹⁴ [2006] HCA 52 at para 794.

⁹⁵ [2006] HCA 52 at para 793.

Specifically in relation to corporations law, Callinan J suggested that the Commonwealth might now claim the legislative power required to form or incorporate corporations. If so, a uniform national Corporation Law might be established without any need for a reference of power from the States. Callinan J wrote:

In my opinion, a consequence of the apparent acceptance of the “object of command” test by the majority here is that *The Incorporation Case* may well now be effectively overruled. In that case, [the Court] held that the Commonwealth lacked legislative competence for the incorporation of corporations under s 51(xx)...Now that the Commonwealth may, it seems, legislate that ‘a s 51(xx) corporation shall...’ or ‘no s 51(xx) corporation shall...’ the States’ powers over incorporation may well be rendered meaningless. The Commonwealth might legislate that ‘no s 51(xx) corporation shall do business without a licence’ and make that licence a licence, for all useful purposes, to exist...⁹⁶

Other commentaries: Exactly how the implications of the *Workplace Relations Case* play out in the future remains to be seen. Taking up the suggestions in the minority judgments, commentators have speculated on the prospects of a centralisation of power in such areas as health, education and over power utilities. An editorial in *The Australian Financial Review* commented:

It may open the way for the federal government to use the corporations power as a vehicle to legislate – potentially to the exclusion of the states – in areas as diverse as workers’ compensation and occupational health and safety; environmental regulation; energy markets, emissions trading and regulation of other economic infrastructure; state red tape affecting corporations; and health and education.⁹⁷

Injecting a note of caution into the debate, the Commonwealth Treasurer, Peter Costello, questioned whether the decision would, in fact, ‘enable a takeover of education or health’. He said:

Education is not delivered by corporations. You’ve only got power to legislate in respect of corporations. Now, the Victorian Education Department, for example, is not a corporation.⁹⁸

Taking up this theme, Associate Professor Graeme Orr commented:

There has been speculation and denial about whether this power will lead to federal

⁹⁶ [2006] HCA 52 at para 897. The majority noted that no party had sought to reopen *The Incorporation Case* and said there was ‘no occasion to consider further what was decided’ in that case (paras 136 and 137). For a commentary on the ‘object of command’ test, see the discussion earlier in this paper.

⁹⁷ ‘A big shift in the balance of power’, *The Australian Financial Review*, 15 November 2006, p 66.

⁹⁸ ‘Costello says Government’s corporations powers limited’, PM, Transcript, 15 November 2006 - <http://www.abc.net.au/pm/content/2006/s1789499.htm>

takeovers of health and education services. But private schools and private hospitals are minority providers. Public schools are not corporations and public hospitals probably don't 'trade' in the constitutional sense.⁹⁹

He continued:

Universities are trading corporations, despite their public goals. But the Commonwealth already micro-manages them by attaching conditions to federal funding. Child care, on the other hand, is one educational arena left largely to the market. The Commonwealth could now insist that corporate child-care centres sing the national anthem each day, or hire a minimum quota of male employees.¹⁰⁰

For Orr, the more critical field of interest lies in the direction of public utilities. He stated in this respect:

More significantly, it is to areas such as energy and water that the Commonwealth may now turn. Utilities are typically incorporated and they clearly trade.¹⁰¹

Another constitutional lawyer, Greg Craven, explained that the Commonwealth can control 'private hospitals, private schools, town planning, even uranium mining, anywhere corporations are involved'.¹⁰² Craven had speculated on the likely implications prior to the decision being made, saying

One possibility might involve the extensive regulation of State local governments, all of which (like universities) take a corporate form under State legislation, and all of which could be viewed as trading corporations by reference to such activities as the running of municipal pools, child care centres and so forth. It may well be that section 51(xx)...would permit the regulation of a wide range of the activities of local government, extending well beyond those activities that are loosely connected with trade.¹⁰³

⁹⁹ G Orr, 'Court gives Howard the whip hand', *The Australian Financial Review*, 15 November 2006, p 67.

¹⁰⁰ Orr, n 99.

¹⁰¹ Orr, n 99.

¹⁰² 'High Court decision paves way for greater federal control', *PM*, Transcript, 14 November 2006 - <http://www.abc.net.au/pm/content/2006/s1788644.htm>

¹⁰³ Craven, n 24, p 212.

4.3 Implications for Australian federalism

For Professor George Williams, the decision in the *Workplace Relations Case* represents a ‘significant shift in power’, one that makes the States ‘very vulnerable’.¹⁰⁴ Indeed, the decision is the culmination of a trend by which the powers of the Commonwealth have been transformed beyond anything the framers of the Constitution intended.¹⁰⁵ There are those in the business community and beyond who welcome that trend, finding in it an opportunity to extend a ‘national’ approach to several key areas of social and economic life; others see it providing an opportunity for positive reform. In this vein, an editorial in *The Australian* said the ‘centralisation of political authority reflects the deficiencies of state administrations and the realities of the modern world’. In its view, the High Court decision ‘has thrown down the gauntlet to State governments to get serious or perish’.¹⁰⁶ An editorial in the *Sydney Morning Herald* concluded:

In the medium term, Australians are likely to see further duplication of effort and further confusion as the two levels of government tussle with each other. Yet though the complexity of this tangled administrative skein will probably get worse before it gets better, the High Court’s decision and all its wide ramifications should be welcomed. It is a recognition in law of the political reality – not a complete recognition, but another step in the right direction – which should logically end, eventually, with the reduction of Australian government from three levels to two: Canberra as the setter of policy and the provider of funds, and the States as the deliverers of services.¹⁰⁷

Very different views were found in the minority judgments, with Callinan J writing:

There is nothing in the text or structure of the Constitution to suggest that the Commonwealth’s powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society.¹⁰⁸

Warning of a ‘a very large risk of destabilising the federal character of the Australian Constitution’,¹⁰⁹ and of ‘a shift in constitutional realities from the present mixed federal

¹⁰⁴ T Dick et al, ‘The day true power went to Canberra’, *SMH*, 15 November 2006 - <http://www.smh.com.au/articles/2006/11/14/1163266550283.html?from=rss>

¹⁰⁵ ‘High Court decision paves way for greater federal control’, *PM*, Transcript, 14 November 2006 - <http://www.abc.net.au/pm/content/2006/s1788644.htm>

¹⁰⁶ ‘High Court ruling a reform positive’, *The Australian*, 15 November 2006.

¹⁰⁷ ‘The High Court changes the balance of power’, *The Sydney Morning Herald*, 15 November 2006 - <http://www.smh.com.au/news/editorial/the-high-court-changes-the-balance-of-power/2006/11/14/1163266545646.html>

¹⁰⁸ [2006] HCA 52 at para 779.

¹⁰⁹ [2006] HCA 52 at para 542.

arrangements to a kind of optional or “opportunistic” federalism’,¹¹⁰ Kirby J went on to say:

Under the Constitution, the position of the federal government is necessarily stronger than that of the States...But it would be completely contrary to the text, structure and design of the Constitution for the States to be reduced, in effect, to service agencies of the Commonwealth, by a sleight of hand deployed in the interpretation by this Court of specified legislative powers on the Federal Parliament.¹¹¹

He asked:

Why...bother to have State Parliaments, with significant federal functions to perform, if by dint of an interpretation of s 51(xx) of the Constitution the legislative powers of such Parliaments could effectively be reduced unilaterally by federal law to minor, or even trivial and continually disappearing functions, specifically in the laws governing industrial disputes. Relatively few important activities in contemporary Australia have no direct or indirect connection with a corporation, its employees, agents and those who trade with it.¹¹²

Writing from a similar perspective and in similar terms, Greg Craven stated that the Commonwealth ‘will use this power to cherry pick’ those areas of activity it chooses to regulate, thereby ushering in an era of ‘opportunistic federalism’. According to Craven:

These choices often would be made not primarily on the basis of specific constitutional responsibility, or indeed settled policy objectives, but rather by reference to impermanent considerations of political advantage and convenience. Under such a regime, the position of the States would be substantially undermined by Canberra in an on-going and random manner. Australia doubtless would continue to be a federation, but one in which the federal balance was a political calculation to be made on a weekly basis.¹¹³

Central to Craven’s argument is that the *Workplace Relations Case* is ‘probably one of the three most important decisions of the High Court’. Indeed, it is his view that the decision ‘changes federalism and constitutionalism in this country from being determined by the constitution to really the political will of the Commonwealth’.¹¹⁴

¹¹⁰ [2006] HCA 52 at para 543.

¹¹¹ [2006] HCA 52 at para 549.

¹¹² [2006] HCA 52 at para 550.

¹¹³ Craven, n 24, p 214.

¹¹⁴ ‘High Court decision paves way for greater federal control’, *PM*, Transcript, 14 November 2006 - <http://www.abc.net.au/pm/content/2006/s1788644.htm>

George Williams believes that the *Workplace Relations Case* calls for a thorough re-appraisal of Australian federalism, a view shared by the Queensland Premier, Peter Beattie.¹¹⁵ What incentive the Commonwealth would have to engage in such an exercise is not clear. It may be that the States will look even more warily upon Commonwealth encroachments into their legislative domain. Striking a discordant note on the theme of cooperative federalism, on the day the judgment was handed down, Anna Bligh, the Acting Premier of Queensland, observed ‘I think the long-term effect of this judgment is that the cooperation between the States and the Commonwealth will now be put in some jeopardy’.¹¹⁶

No doubt the decision points to the further marginalisation of the States, a view that can be expressed in various ways and to different degrees. For Professor Ron McCallum, ‘If carried to its logical extent [the decision] makes States like municipal governments’.¹¹⁷ Justice Callinan was at pains to explain the significance of the case for the future of Australian federalism, saying:

This is one of the most important cases with respect to the relationship between the Commonwealth and the States to come before the Court in all of the years of its existence. If the legislation is to be upheld the consequences for the future integrity of the federation as a federation, and the existence of the powers of the States will be far-reaching.¹¹⁸

¹¹⁵ ‘High noon for the States’, *SMH*, 15 November 2006 - <http://www.smh.com.au/news/national/high-noon-for-the-states/2006/11/14/1163266550361.html> See also A Lynch, ‘Time to reshape Australian federalism’, *The Sydney Morning Herald*, 15 November 2006 - <http://www.smh.com.au/news/opinion/time-to-reshape-australian-federalism/2006/11/14/1163266547681.html>

¹¹⁶ ‘High Court rules WorkChoices lawful’, *PM*, Transcript, 14 November 2006 – <http://www.abc.net.au/pm/content/2006/s1788625.htm>

¹¹⁷ M Priest and M Skulley, ‘Court extends PM’s power over states’, *The Australian Financial Review*, 15 November 2006, p 12.

¹¹⁸ [2006] HCA 52 at para 619.

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