

Chapter Ten

The High Court chooses: Will *Work Choices* work?

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Almost 15 years I was invited by Ray Evans to present my views on the constitutionality of the federal Coalition's Jobsback policy to the HR Nicholls Society. I had just completed my honours thesis on that topic, and Professor Greg Craven had presented a paper¹ to that Society's 1991 Conference which I thought was in need of challenge.

To say I was invited, overstates things somewhat. I had written to Mr Evans, asking him to invite me to speak on the topic. He rang me very promptly and, with much enthusiasm, asked me to speak. Unfortunately he did so without obtaining the consent of the Board. Then John Stone found out. He sent me a letter, on behalf of the Board, explaining that I was uninvited.

It was therefore with some surprise that I received a call from Mr Stone a few months ago asking me to speak at this conference on the topic of the constitutionality of the federal Coalition's *Work Choices* legislation.² He told me that he would send me a letter. It was with some trepidation that I opened it. But I needn't have been concerned. It stated that I was invited, that John Stone was writing "on behalf of the Board", and that Justice Michael Kirby would be speaking by video.

I have not been able to find that letter of many years ago, or indeed my honours thesis. And I am glad I was not asked to speak. There are enough undergraduate views. In any event, SEK Hulme, QC spoke on the topic at the HR Nicholls conference.³ Hulme introduced his speech, as follows:

"[Craven] came to the view that legislation 'will be attended by major constitutional difficulties', which might not be insuperable, but which 'are undeniably grave'. I have been invited to revisit that area for you tonight. Your organisers having rejected my suggestion that this was not a very gentlemanly thing to do to people who have worked hard all day and have just had a very pleasant dinner, I fear that I must do as I was asked".

His conclusion was that Jobsback was constitutionally sound. His criticism of Professor Craven's paper is worth re-reading. For those who have not read it, it concludes with a little story about Sir Owen Dixon. Since that time there have been many academic papers on this question. Nearly all of them support Hulme.⁴

The latest paper worth mentioning is that of Dr Chris Jessup, QC.⁵ Dr Jessup is the leading industrial lawyer in the country. He looked at the question of the constitutionality of *Work Choices* a couple of months ago, and came to a similar view.

What is *Work Choices*?

It is not possible in a paper of this nature to give a comprehensive overview of *Work Choices*; however, I can mention three aspects which are relevant to the question of constitutionality.

First, *Work Choices* abandons direct reliance upon the industrial power.⁶ The point of this change is to replace, over time, the award system with a system of minimum "fair pay and conditions". This new fair pay and conditions standard is anchored by a cocktail of powers: the public service power, the Territories power, the trade and commerce power and, most relevantly for this paper, the corporations power.⁷ For the purposes of this paper, I intend to ignore these other heads of power, and refer only to the corporations power.⁸ Thus, in simple terms, the power to resolve interstate industrial disputes, by arbitration to create federal awards, has been removed. The death of the industrial dispute is something about which, I am sure, some people might feel some nostalgia. No more s. 99 dispute notifications; s. 101 findings of industrial dispute; and no repeat of the types of challenges to those findings that have littered the law reports.

The second change is related to the first. *Work Choices* attempts a takeover of the State award system. By applying the federal minimum pay and conditions standard to all corporate employers, the State

award system is rendered largely irrelevant. By this I mean that State awards are converted into federal instruments,⁹ and the capacity to make new and effective State awards is made more difficult by operation of s. 109 of the Constitution.¹⁰ The power which is relied upon to do most of this State industrial system-breaking work, is the corporations power.

Third, bargaining on an individual and collective basis is emphasised. I don't think it is accurate (or at least it is too early) to say that it is made easier; it is simply that the front-end hurdles associated with certification have been replaced with big back-end penalties. These new bargaining provisions are now based exclusively on the corporations power, rather than, as has been the case since the Keating reforms, partly on the industrial power and partly on the corporations power.

There are many, many other changes which have been made. For example, the new rules concerning protected industrial action (including the secret ballot provisions), the new regime for penalising unlawful industrial action, and the new provisions governing the regulation of trade unions, are all areas upon which one could focus much attention. Indeed, one could devote a paper entirely to the transitional provisions. But, for the purpose of this paper, it seems fair to concentrate on the three I have mentioned, and to conclude that without the corporations power, this *Work Choices* created regime of individual and collective bargaining, and the national system of fair pay and conditions which underpins it, would be extremely ineffective.

Indeed, even with the corporations power, about 15 per cent of employers may stand outside the national system. It is worth remembering that most of the century-old law concerned with the industrial power was generated by a desire to escape the clutches of the federal regulators. Depending upon how the system develops over time, that desire may remain, and much of the energy previously devoted to devising ways of slipping out of "industrial disputes" may instead be turned to escaping the orbit of "trading corporations". Without the corporations power, it would be back to the drawing board for the government. And this would probably mean, back to the industrial power.

The High Court challenge

I am lucky to be speaking to you this Sunday morning, because the High Court challenge to the legislation wound up just over two weeks ago. One of the wonders of modern times is the Australasian Legal Information Institute. Transcripts of all High Court proceedings are available on the austlii.edu.au site, free of charge, within a day or so of the hearing.

The High Court proceedings ran for six days,¹¹ and anyone in Australia (or indeed the world) can click on and follow the proceedings. The most interesting parts are the answers by counsel to interjections by the Justices. The argument in the High Court, and particularly the interchanges between bar and bench reflect, to some extent, the debate between Hulme and Craven over a decade ago. It is a debate between those who simply took the constitutional law as they found it, and those who did not like where this took them. Indeed, there is a respectable argument that the challenges of each of the (Labor) States to *Work Choices*, are grounded more in policy than in law (in particular Victoria, which ceded legislative power to Canberra in this area, and yet still joined in the challenge).¹²

It is not possible in a paper such as this to do more than touch on the legal arguments. For those who want to look at these questions more closely, it is perhaps most convenient to start with Dr Jessup's paper, then the High Court transcripts, the articles to which I have made reference, and of course the cases themselves.

The modern law concerning the corporations power starts with the Barwick High Court's decision to uphold (after some minor re-drafting) the Barwick-inspired trade practices legislation in *Strickland v. Rocla Concrete Pipes Ltd*,¹³ and stretches over the last 35 years. Unfortunately much of the debate concerning this question ignores this fact: the long-standing jurisprudence concerning this subject. This is a point to which I will return, after mentioning the legal arguments.

The legal arguments

Bearing in mind Hulme's suggestion that it is not a very gentlemanly thing to require a group of people who should be enjoying a day of rest to listen to constitutional arguments concerning *Work Choices*, I will deal with this part of the paper as quickly as possible.

As to the three aspects of the legislation that I have identified as important, the legal questions seem

to be fairly straightforward. Dr Jessup has identified the question raised by the minimum standards and agreement-making provisions as follows:

“The constitutional question presented by [the minimum standards] provisions, then, is whether a law which obliges a s. 51(xx) corporation to pay its employees at least a rate of wage specified in a defined manner is a law with respect to such a corporation....The constitutional question presented by [the agreement making] provisions in turn is whether a law which permits a s. 51(xx) corporation to make industrial agreements with its employees, or with trade unions representing its employees, and provides for the content and enforcement of those agreements, is a law with respect to such a corporation”.

Dr Jessup concluded as follows:

“The position remains, therefore, that, if the law is as stated by Brennan, Toohey and McHugh JJ in *Re Dingjan*, one might confidently give an affirmative answer to the [agreement making] provision. If so, there seems no reason why one might not likewise answer affirmatively the [minimum standards] question, namely, whether the Parliament has power to make a law imposing an obligation upon a s. 51(xx) corporation to meet certain minimum employment standards”.¹⁴

The questions, said by the High Court to be raised by the minimum standards and agreement-making provisions, were couched in similar terms to those which were said to be raised by Dr Jessup. Perhaps they can be summarised in this interchange between Justice Gummow and one of the Commonwealth’s counsel:

“Gummow J: Can I just put this to you, Mr Burmester. I do not think it cuts across what you are saying but it will help me. The critical provision is 6(1)(a),¹⁵ is it not?”

“Mr Burmester: Yes, your Honour.

“Gummow J: That postulates and takes as a given, if you like, a constitutional corporation.

“Mr Burmester: Yes.

“Gummow J: There are not any at the Bar table as it happens, but as time goes on I imagine it would be possible that a corporation will put its hand up at some stage and say, ‘I am not a constitutional corporation. This Act has nothing to do with me and I want prohibition’.

“Mr Burmester: Quite likely.

“Gummow J: But that is not today’s argument because this is a demurrer.¹⁶ So we posit a constitutional corporation, whatever that phrase means, but we posit there is such a creature and then we ask: is it employing or usually employing individuals?”

“Mr Burmester: Yes.

“Gummow J: Then we take the next step and we look at various legislative norms that are then imposed on that relationship in one way or another and then we ask: are those particular norms which bear upon this employment relationship, are they laws with respect to the constitutional corporation?”

“Mr Burmester: That is correct, your Honour.

“Gummow J: Is that not it?”

Indeed to me, that does seem to be it. And the answer, based upon the last 35 years of authority, seems to be that the minimum standards and agreement-making provisions constitute a valid exercise of the corporations power. That these provisions are constitutionally valid seems to be implicit in the following interchange, between the Chief Justice and one of the Commonwealth’s counsel (and note Justice Gummow’s contribution at the end):

“Gleeson CJ: Let us confine it to trading corporations. If it is not a trading corporation, end of story.

“Mr Burmester: Yes.

“Gleeson CJ: If it is a trading corporation, its relations with all its employees, regardless of what particular activity they perform, are a matter of business, are they not?”

“Mr Burmester: Yes, quite likely, your Honour, in this context.

“Gleeson CJ: A contract of employment between a municipal council and a health inspector is a business relationship, is it not?”

“Mr Burmester: Yes, your Honour, and we would say

“Gleeson CJ: Just as much as is a contract of employment between a council and the man who sells refrigerators.

“Mr Burmester: Yes, your Honour, and it may be that all your Honours need to decide for the purpose of upholding the provisions in this case is that particular provisions operate on a business activity or relationship with a constitutional corporation ... and on that basis the law is valid.

“Gummow J: So it may be encapsulated by the last sentence of paragraph 83 of Justice Gaudron’s reasons in *Pacific Coal* 203 CLR 346 at 375. What she is doing I think in that paragraph is giving content to, as you are attempting to do here, I think, ... what will be with respect to this given of a trading corporation, and that ‘laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations’ will be laws with respect to the corporation”.

Turning then to the third aspect of the legislation, upon which I have focused attention, the view of Dr Jessup was that the attempt to exclude State industrial tribunals was constitutionally sound. Like the interchanges I have referred to above concerning the constitutionality of the minimum standards and the agreement-making provisions, the ease with which the Commonwealth’s submissions were treated, on the question of the exclusion of State laws, might contain some clue as to the likely result on this inconsistency point:

“Mr Burmester: We accept there has to be a head of power. It clearly links back to the heads of power that support the definitions of ‘employee’ and ‘employer’ in sections 5 and 6. We say that the principle in *Wenn* has not been contradicted in later cases, but in cases like the *Native Title Act Case, Western Australia v. Commonwealth* (1995) 183 CLR 373 particularly at 464 to 468, and in the *Botany Municipal Council v. Federal Airports Corporation* (1992) 175 CLR 453 at 464 to 465, one finds statements that, in our submission, are consistent with those in *Wenn*, and which indicate that there is an ability to exclude State laws even though the Commonwealth may not have made its own detailed provisions on the subject.

“The issue is one of power – is it a law with respect to a head of power? – rather than whether there is a prohibition on excluding State law. In our submission, one cannot characterise section 16, given the way in which it is drafted, the laws to which it applies, which confine it to section 5 employees and section 6 employers, as a bare attempt to prevent State law making.....

“Gummow J: Can we just go back to the *Native Title Act Case* for a minute?

“Mr Burmester: Yes, your Honour.

“Gummow J: Do you rely on the passage at 467 in 183 CLR?

“Mr Burmester: The passage from *O’Reilly* that has been quoted, your Honour?

“Gummow J: The first paragraph, ‘The critical question.....’.

“Mr Burmester: ‘The critical question is the scope of Commonwealth legislative power. Provided the power supports a Commonwealth law making its regime exclusive and exhaustive, the law may validly exclude in terms the application of State law to the subject matter’.

“Yes, your Honour. Then there is a reference to the *Botany Municipal Council* that I also referred to.

“Gummow J: *Botany* is a useful illustration of that, is it not?

“Mr Burmester: Yes, your Honour. We exclude the State environmental law and particular planning approvals and so on and put our own limited regime in place”.

It seems likely, in my view, that the three central aspects of the legislation that I have identified will survive this challenge. Other parts of the legislation might not survive, and indeed these three central parts (like the trades practices legislation post-*Rocla Concrete Pipes*) might have to be slightly re-cast. However, one would think that the legislation looks to be on fairly safe constitutional ground.

There is nothing particularly controversial about this conclusion. It is similar to the conclusion that Dr Jessup came to a couple of months ago, and to the conclusion that Hulme (and I) came to over a decade ago. Moreover, the first academic paper suggesting that the Commonwealth had power to regulate the contract of employment, through the corporations power, is now almost 30 years old.

It may have been because the legal position is seemingly so strong, that much of the debate in the High Court was concerned with policy issues. Indeed at times, as I have stated above, the debate seemed to be between those who simply took the constitutional law as they found it, and those who did not like where this led them. The reason of those who did not like the legal conclusions was, of course, the impact that this would have on the federal / State balance.

The federal / State balance arguments

It is submitted that the following extract of the interchange between the Commonwealth Solicitor-General and Justice Kirby, with the Chief Justice and Justice Gummow joining in the debate on the side of the

Commonwealth, best captures the argument and the counter-argument on this federal / State balance point. The Solicitor-General starts by explaining how changes in the make-up of a society might impact upon the federal / State balance (by referring to the Commonwealth's bankruptcy,¹⁷ quarantine¹⁸ and defence¹⁹ powers), as follows:

"Mr Bennett: ... the examples of bankruptcy in the Depression, quarantine during a pandemic, defence during a war.

"Kirby J: But it is a tricky argument because, at least on one view, it runs so far that the corporation and the corporations power on your theory has expanded so greatly that its very expansion causes one to think, what effect do we give to this power within the context of a federal Constitution, and within the context of a power that is directed to persons and in a constitutional document that requires us, both by its character and form and by its words, to have regard to what is elsewhere provided in the Constitution.

"Mr Bennett: Your Honour, that is the necessary consequence. If Australia came to be populated 99 per cent by people who were aliens who chose not to become citizens, the same thing would apply.....

"Gleeson CJ: ...With these developments it appears the position of the Commonwealth, the federal government has waxed; and that of the States has waned.

"Mr Bennett: Yes: that the Commonwealth would, as time went on, enter progressively, directly or indirectly, into fields that had formerly been occupied by the States, was from an early date seen as likely to occur.

"Kirby J: Yes, but at least a responsible constitutional court, when the waning comes to the point of almost extinction, has to then ask, is this the sort of waning that the Constitution had in mind in its text?

"Mr Bennett: Your Honour, in my submission, it does not have anything like that effect.

"Kirby J: If you could affect every trading corporation by name and everything it does and everything everybody associated, or certainly its employees and those who trade with it, who deal with it, who contract with it, who have come within its physical boundaries, who have any association with it in your list of constitutional powers, then the waning has gone to a point, that at least if you adhere to a federal notion of our polity, you have to pause. At least that is the role of this Court, as I can see.

"Mr Bennett: Your Honour, the effect of the Constitution was that certain powers were given to the federal Government. They were powers which even at the time had a very significant effect on the economic life of the community. If one takes a world in which only economics are looked at, the Federal Compact was one which was very largely one-sided in that respect. It is not as if section 51 said (a) economic matters. It did not go as far as that, but in many ways it did, and the quantitative analysis your Honour puts to me limits the world to the world of economics. In the world outside the world of economics the dramatic effect is not as great.....

"Kirby J: I am not so sure about that. Music is performed and art is performed by corporations. Increasingly the business of government is privatised and sent out so it is done by corporations.

"Mr Bennett: Yes.

"Kirby J: I am just saying that that is the importance of this case, that what began in a sense in the *Engineers' Case* and led to the waxing of the Commonwealth in its hey day and was very important for the building of the nation, has come to the point that the waxing has overwhelmed the States and we have to, as it were, pause and say, is that what the structure and purpose of the Constitution and the text subject to this Constitution mean? That is the importance of this case.

"Mr Bennett: Well, your Honour, it does. Another example of how it has occurred is in the area of income tax, where the changes in the way tax has been levied over the years has resulted in a growth in the economic significance of the Commonwealth at the expense of the States. Now, that has happened, that has been upheld, and it was always inherent in the Constitution that it could occur as, we say, is this development. The issues that are being debated are issues. But we submit, the mere fact that the effect of changes that have occurred in society is to make a power more significant is not a reason for reading down that power.

"Gleeson CJ: If you want to look at the way the relationship between the Commonwealth and the States was envisaged 100 years ago, you do not need to go past section 94 of the Constitution.

"Mr Bennett: No, precisely, your Honour. The original idea was that a sum of money was levied by the Commonwealth, was spent on certain things, and the surplus was returned to the States. That provision

is still in the Constitution but changes.....

“Gummow J: Unhappily it says “may”.

“Gleson CJ: Yes. It was originally envisaged that the surplus that we saw being dealt with yesterday would be given back to the States to spend.

“Mr Bennett: Yes, it was, your Honour. Modern accounting methods have rather dealt with that fairly effectively.

“Kirby J: I know these jocular examples. All I am saying is that we have reached a point where the joke is beginning to become a bit of a worry. There are great arguments for Federation, as the federations of the world demonstrate. They divide power and that is a very important protection for liberty.

“Mr Bennett: Yes, and one fairly standard consequence of Federation, which one sees in the United States, one sees in Australia and no doubt sees in other federations, is that where one starts with a division of powers, in many ways the federal powers are going to become more important, and what is either left to or granted in some Constitutions to the States is going to become less important. That is part of, if one likes, a local aspect of globalisation. It is a natural trend. It is what Justice Windeyer was referring to, and referring to, we would respectfully submit, with great accuracy, in *Victoria v. The Commonwealth*.

“Kirby J: It is a natural trend, but when it comes to the point of threatening viability and relevance of the States, then you have what we see before us: every one of them here objecting to what is being done. We have to resolve it. Anyway, I think these are generalities, and though it is proper that they be exposed because they, as it were, lie at the bedrock of the reasoning that one uses to approach specific constitutional problems, they do not solve the problem. They merely expose the concern that lies behind the search.

“Mr Bennett: Your Honour, at the end of the day we submit this case does not really go any further than a wealth of existing authority in this Court, including *Tasmanian Dam, Dingjan, CLM*.....

“Kirby J: My point is they were written in earlier times and, ultimately, lawyers who follow logic have to ask where it has led them and where it is leading them and, more importantly, where it is leading the Commonwealth.

“Mr Bennett: Most of those cases, your Honour, are not very much earlier times. Most of the cases on which we rely, unlike *Huddart Parker*, which some people attempt to resuscitate, were decided in the last 30 or 40 years and some in the very recent past. We submit there is no giant step here from the legal point of view.

“Kirby J: A giant step is not now needed. It is little steps that are taken that accumulate that amount to the giant step. When you are in the midst of it, you often do not notice it.

“Mr Bennett: Your Honour, that is the process of the development of the law and particularly the development of constitutional law”.

Though I am quite sympathetic to his concerns regarding the federal / State balance, I think that the approach to legal reasoning suggested by Justice Kirby is quite improper. I hold this view for four reasons. First, one cannot pretend that the *Engineers' case*²⁰ was never decided, and that *Rocla Concrete Pipes* and the 35 years of jurisprudence which has built upon it, does not exist. As Justice Gummow observed during the argument:

“Gummow J: ... When we are talking in this context about the Constitution, we mean the Constitution as it is operating, as it is construed from time to time by the Court. That is what the Constitution explicitly recognises in Chapter III. When you talk about the Constitution requires this, that or the other, you cannot just look at the text at any point of time; you have to know what the Court doctrine is in construing it from time to time”.

Secondly, the judicial method requires proper respect to be provided to the reasoning and thus the received wisdom of the judges who have gone before. Justice Kirby is not entitled to dismiss the “wealth of existing authority in this Court” on the basis that “they were written in earlier times”. The prevailing Court doctrine constituted by these cases cannot be air-brushed away, because they “were written in earlier times”. The fact that they “were written in earlier times” means that they constitute the relevant Court doctrine. The current judges are not entitled to arrogate to themselves a blank slate and commence interpreting the Constitution as if they were the first judges to be set that task. As Gibbs J said in *Queensland v. The Commonwealth*:²¹

“No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision

did not survive beyond the rising of the Court”.

Thirdly, ideas such as constitutional originalism (which I understand is a form of interpretation with some adherents in the United States), are simply a way of by-passing the collective wisdom of the 10 former Chief Justices and 34 Justices to have sat on the Court, over the last century.

I agree with Justice Kirby’s views, when he states:

“There are great arguments for Federation, as the federations of the world demonstrate. They divide power and that is a very important protection for liberty”.

However, I don’t agree with Justice Kirby’s next step: using the so-called “original” (federal) nature of the Constitution as a means of avoiding 35 years of jurisprudence. By lifting himself onto a plane upon which he does not have to dirty himself with the prevailing law, he can more easily get to a result that is inconsistent with the prevailing Court doctrine. The result is that, under the guise of applying the law, the decision-maker simply ignores it. While such an approach is no doubt very liberating, it is hardly consistent with administration of justice according to law. David Marr caricatured Sir Garfield Barwick’s views as: “no case is a precedent unless I agree with it”.²² The “originalist” approach to the corporations power proceeds from a similar assumption.

Fourthly, Justice Kirby’s implied criticism of the traditional judicial method, of approaching matters on a case by case basis, is strange. In *Rocla Concrete Pipes*, Barwick CJ noted:

“We were invited in the argument of these appeals to set as it were the outer limits of the reach of the power under this paragraph of s. 51. This for my part I am not prepared to do: and indeed I do not regard the Court as justified in doing so. The method of constitutional interpretation is the same as that with which we have been long familiar in the common law. The law develops case by case, the Court in each case deciding so much as is necessary to dispose of the case before it.

“The limits of the power can only be ascertained authoritatively by a course of decision in which the application of general statements is illustrated by example”: *R v. Burgess; Ex parte Henry* (1936) 55 CLR 608, at p 669 per Dixon J (at p 490).....

“Of course frequently in order to dispose of a case the Court must state and discuss general principles or express concepts which are of value in subsequent cases. But that is a very different thing from setting out to decide at one blow the full ambit of a constitutional power”.

You will recall the Solicitor-General suggested that “there is no giant step here from the legal point of view”. You will also recall Justice Kirby’s response:

“A giant step is not now needed. It is little steps that are taken that accumulate that amount to the giant step. When you are in the midst of it, you often do not notice it”.

This seems to me to be a manufactured concern. What is small, gradual, step by step reasoning, in which the law develops case by case, with the Court in each case deciding so much as is necessary to dispose of the case before it, to be replaced with? A giant step of course, presumably in a direction of Justice Kirby’s choosing; unanchored by the “little steps” that have led away from the chosen direction.

In this case, the Chief Justice indicated that he was not interested in doing anything other than simply deciding this case and nothing more (despite Justice Kirby’s suggestions to the contrary):

“Heydon J: ... do we have to bother with the ambitious submission?”

“Mr Bennett: Your Honours do not, probably. It is a convenient way of dealing with much of the Act but it is not.....

“Gleeson CJ: It is a convenient way of arguing the next case.

“Kirby J: It is what we always have to keep our eye on.

“Mr Bennett: Yes.

“Gleeson CJ: And what we have always said we will never decide”.

In my view, in a case such as this, the Court should try to keep its collective eye on the judicial questions which arise for decision, and nothing more. The Court should decide the questions asked of it by reference to the application of (and if necessary the development of) the prevailing law with the benefit of focused argument. It should do so by carefully considering the arguments made and (not least) the legislation under challenge. To try to imagine the battle lines which might next be drawn in some federal / State contest, and to attempt to head off those battles even before the lines are drawn or the battles fought, is a task which is more appropriately left to politicians and the political process.

Thoughts on the federal / State balance in industrial affairs

As I have discussed, many of the concerns expressed about the impact of the corporations power upon the federal / State balance are directed to the possible future use of the power. Some, however, are directed to the impact on the federal / State balance of this particular legislation. I believe these more narrow concerns are overstated. Indeed, I think they will prove to be unfounded. The reason is two-fold. Firstly, while it is likely that charities and other non-trading corporations will fall outside the scope of the new legislation, the federal industrial power has captured such bodies since the *Social Welfare Union Case*.²³

Secondly, employers who take the form of, for example, partnerships, trusts and natural persons, have been roped into “paper” interstate industrial disputes for almost 100 years, even though they are not corporations. Under the previous regime it was fairly easy to manufacture such a dispute and thereby to obtain an award. What may change over time is that employers may incorporate to try to bring themselves within the scope of the federal law, and one might surmise that in order to facilitate this, the cost of incorporation has been reduced to \$400.

I accept that, as a matter of practice, it is likely to be easier for an employer to incorporate than to become party to an interstate industrial dispute. However, even bearing this in mind, I think it likely that the national coverage of the corporations power will remain less comprehensive than that potentially afforded by the industrial power.

Indeed, the federal industrial power was used in this broad way to emasculate the Kennett Government’s *Work Choices* style industrial reforms, by allowing traditionally State-regulated workers to “escape” to the federal system. Many were *Social Welfare Union Case*-type employees. After five years of fighting and upon the election of the Howard Government, the Kennett Government ceded its industrial powers to the federal government. The lesson from those events was that even a State government, spending millions, could not escape the clutches of the interstate industrial dispute.²⁴

The Commonwealth could and did, with relative ease, use the industrial power to suppress labour market deregulation in a State, just over a decade ago. This fact does not appear to have attracted the attention in this latest debate about the impact of the corporations power upon the federal / State balance in industrial affairs that, in my view, it deserves. Indeed, the Commonwealth government could have used its industrial power to do what Senator Cook did to Jeff Kennett – but in reverse. It could have legislated to allow employers to “escape” to the federal system but it is using the corporations power instead.

Presumably it chose not to use the industrial power, because it prefers the “Canberra club” to the “industrial relations club”; the Fair Pay Commission to the Industrial Relations Commission. It is true that the use of the corporations power allows a more direct form of regulation than that afforded by the industrial power. The use of the industrial power invariably brings with it a third party arbitrator.

Ultimately, I think the point remains. The federal / State balance in industrial affairs will not be significantly altered if the High Court gives the all-clear to the use of the corporations power, because the Commonwealth could have achieved its national system by use of the industrial power. Indeed, the reach of the corporations power might prove to be slightly smaller than that which may have been possible had the Commonwealth chosen to employ the industrial power.

Conclusion

As I have stated above, for my own part, I think the constitutional challenge will fail (at least in relation to the main parts of the legislation). However, the use of the corporations power does not, in my view, significantly alter the current federal / State balance in industrial affairs. Although I accept (in general terms) that this development will probably present opportunities for the Commonwealth to further degrade the federal nature of our constitutional compact, I would much rather see these problems addressed through political action than through the courts.

Working in close contact with lawyers, I fear (undemocratic) judicial activism much more than I fear (democratic) centralism. The courts should simply apply the law as they find it, and leave questions as to the federal balance for the politicians and the political process.

I have drawn attention to Justice Kirby’s interjection, that it “is little steps that are taken that accumulate that amount to the giant step. When you are in the midst of it you often do not notice it”. I think the Solicitor-General’s response: “Your Honour, that is the process of the development of the law and particularly the development of constitutional law”, encapsulates, in one sentence, the points I have tried to make in this

paper.

Endnotes:

1. G Craven, *Voluntary Industrial Agreements: You Agree, I Agree, But Will The High Court Agree?:* <http://www.hrnicholls.com.au>.
2. The post-*Work Choices* workplace relations legislation is (still) the *Workplace Relations Act* 1996 (“the Act”), albeit amended and renumbered. The changes to the Act were introduced by the *Workplace Relations Amendment (Work Choices) Act* 2005 (No 153) (hereinafter “*Work Choices*”).
3. SEK Hulme, *A Constitutional Basis for the Federal Coalition’s Industrial Relations Policy and Related Matters:* <http://www.hrnicholls.com.au>.
4. The Parliament of Australia, Parliamentary Library contains the following references at <http://www.aph.gov.au/library/intguide/law/workchoicesbill.htm>, under the heading “Journal articles on the constitutionality of a national employment law”:
 - A Gray, *Precedent and Policy: Australian Industrial Relations Reform in the 21st Century Using the Corporations Power*, *Deakin Law Review*, vol. 10, no. 2, 2005, pp. 440–59.
 - R McCallum, *The Australian Constitution and the Shaping of Our Federal and State Labour Laws*, *ibid.*, pp. 460–9.
 - G Williams, *The Constitution and a National Industrial Relations Regime*, *ibid.*, pp. 498–510.
 - A Stewart, *Workplace Relations: The Revolution begins here*, *New Matilda*, 1 June, 2005.
 - L Johns, *National IR system is logical*, *HR Monthly*, April, 2005, pp. 36–7.
 - D McCann, *First head revisited: a single industrial relations system under the trade and commerce power*, *Sydney Law Review*, 26(1), March 2004, pp. 75–106.
 - G Williams, *The first step to a national industrial relations regime? Workplace Relations Amendment (Termination of Employment) Bill 2002*, *Australian Journal of Labour Law*, 2003, 16(1), May, 2003, pp. 94–8.
 - G Williams, *Submission to the Senate Employment, Workplace Relations & Education Committee Inquiry into the Provisions of the Workplace Relations Amendment (Termination of Employment) Bill 2002*, 6 February, 2003.
 - N Williams and A Gotting, *The interrelationship between the industrial power and other heads of power in Australian industrial law*, *Australian Bar Review*, 20(3), February, 2001, pp. 264–82.
 - S Eichenbaum, *What chance a single industrial relations system in Australia?*, *Law Institute Journal*, 76(6), July, 2002, pp. 66–9.
 - P Lane, *Commonwealth control of corporate industrial relations*, *Australian Law Journal*, 75(11), November, 2001, pp. 670–2.
 - A Stewart, *Federal labour law and new uses for the corporations power*, *Australian Journal of Labour Law*, 14(2), September, 2001, pp. 145–68.
 - W J Ford, *Using the corporations power to regulate industrial relations*, *Employment Law Bulletin*, 6(9), January, 2001, pp. 70–7.
 - W J Ford, *Reconstructing Australian labour law: a constitutional perspective*, *Australian Journal of Labour Law*, 10(1), March, 1997, pp. 1–30.
 - W J Ford, *The Constitution and the reform of Australian industrial relations*, *Australian Journal of Labour Law*, 7(2), August, 1994, pp. 105–31.
 - S E K Hulme, *A constitutional basis for the federal coalition’s industrial relations policy – and related matters*, *Economic and Labour Relations Review*, 4(1), June, 1993, pp. 62–76.
 - A Stewart, *Federal regulation and the use of powers other than the industrial power*, in ACIRRT Monograph No. 9, *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations*, Proceedings of a Conference, 30 April, 1993.
 - G Lindell, *The corporations and races powers*, *Federal Law Review*, 14(3), March, 1984, pp. 219–52.

- D Rose, *Comment on the corporations power and the races power*, *Federal Law Review*, 14(3), March, 1984, pp. 253-7.
 - J O'Donovan, *Can the contract of employment be regulated through the corporations power?*, *Australian Law Journal*, 51(5), May, 1977, pp. 234-46.
5. C N Jessup, *Work Choices and the Constitution*, (unpublished paper 2 March, 2006, given to the Law Council of Australia, 5 March, 2006).
 6. The industrial power is s. 51(xxxv) and states that the Commonwealth Parliament shall “have power to make laws ... with respect to:(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State”.
 7. See section 6 definition of “employer” at Endnote 15 (below).
 8. The corporations power is s. 51(xx) and states that the Commonwealth Parliament shall “have power to make laws ... with respect to:(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth”.
 9. Known as a “notional agreement preserving State awards” (“NAPSA”).
 10. See also, *supra*, Dr Jessup’s paper, at paras [40-5], especially last sentence in para [45].
 11. High Court Proceedings: 4, 5, 8, 9, 10 & 11 May, 2006:
 4 May: <http://www.austlii.edu.au/au/other/HCATrans/2006/215.html>.
 5 May: <http://www.austlii.edu.au/au/other/HCATrans/2006/216.html>.
 8 May: <http://www.austlii.edu.au/au/other/HCATrans/2006/217.html>.
 9 May: <http://www.austlii.edu.au/au/other/HCATrans/2006/218.html>.
 10 May: <http://www.austlii.edu.au/au/other/HCATrans/2006/233.html>.
 11 May: <http://www.austlii.edu.au/au/other/HCATrans/2006/235.html>.
 12. See Part 21 of the Act, which is headed “Matters referred by Victoria”.
 13. [1971] HCA 40; (1971) 124 CLR 468.
 14. Para [19] of Dr Jessup’s paper states:
 “The judgments of Brennan, Toohey and McHugh JJ in *Re Dingjan* would probably provide a reasonably solid base upon which one could conclude that the central provisions of Part VB of the Act are valid. Although their Honours held that the operation of s. 127C(1)(b) was outside s. 51(xx), their reasoning would support the view that a law which operated upon agreements entered into between constitutional corporations and their employees (or unions representing, or potentially representing, those employees) would be within power”,
 but is then qualified by paras [20-1].
 15. Section 6 is headed “Employer” and states as follows:
 “Basic definition
 (1) In this Act, unless the contrary intention appears: “*employer*” means:
 (a) a constitutional corporation, so far as it employs, or usually employs, an individual”.
 (Emphasis added).
 16. These days, a more common name for a “demurrer” is a “strike out” or “summary dismissal”.
 17. The bankruptcy power is s. 51(xvii) and states that the Commonwealth Parliament shall “have power to make laws ... with respect to:(xvii) Bankruptcy and Insolvency”.
 18. The quarantine power is s. 51(ix) and states that the Commonwealth Parliament shall “have power to

make laws ... with respect to:(ix) Quarantine”.

19. The defence power is s. 51(vi) and states that the Commonwealth Parliament shall “have power to make laws ... with respect to:(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth”.
20. *Amalgamated Society of Engineers v. Adelaide Steamship Company Limited* (1920) 28 CLR 129.
21. *Queensland v. The Commonwealth* (1977) 139 CLR 585 at 599.
22. D Marr, *Barwick*, George Allen & Unwin Australia Pty Ltd, Sydney, 1981, at 218.
23. *The Queen v. Coldham; Ex Parte Australian Social Welfare Union* [1983] HCA 19; (1983) 153 CLR 297.
24. I have not ignored the impact of *Re AEU*. But that principle would apply to legislation under s. 51(xx) as well. The full title of the case, *Re Australian Education Union and Australian Nursing Federation and Others, Health Services Union of Australia and Others, Re Australian Liquor, Hospitality and Miscellaneous Workers Union and Others, Re State Public Services Federation and Another, Re Printing And Kindred Industries Union of Australia and Another, and Australian Federal Police Association and Another; Ex Parte The State of Victoria and Others* [1994] HCA 26; (1995) 128 ALR 610; (1995) 69 ALJR 451, gives some clue to the extent of the federal takeover of the Victorian system. As does the reasoning in (e.g.) para [49]:

“To say that the limitation protects the existence of the States and their capacity to function as a government is to give effect more accurately to the constitutional foundation ... [To go further] would protect a substantial part of a State’s workforce from the impact of federal awards, notwithstanding that the operation of those awards in relation to school teachers, health workers and other categories of employees would not destroy or curtail the existence of the State or its capacity to function as a government”.