Chapter One

Work Choices: Did the States run dead?

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In *New South Wales v. The Commonwealth* (*The Work Choices Case*)[1] Justice Callinan cited with approval the statement of Sir Robert Menzies that "constitutional law in a federal system is 'a unique mixture of history, statutory interpretation, and some political philosophy' ".[2] This paper covers similar territory.

My purpose is to examine the arguments of constitutional history and statutory interpretation the States put, or rather failed to put, to the High Court, and to what extent the political philosophy of the State governments influenced the outcome of the case. In short, I will argue that the case mounted by State Labor governments and trade unions was not the full-throated challenge that one would expect given the rhetoric of the State governments. In making these observations I am not being critical of those lawyers advising the States or the unions. Rather, it is my view that the State Labor governments, who were always content for the Commonwealth to have power over industrial relations, pulled their punches in a case that, in a constitutional sense, required a full-frontal attack. State taxpayers and our federal system of government deserved better.

What the Court found

On 14 November, 2006 the High Court delivered judgment in the *Work Choices Case.* The litigation arose from a challenge by six States, two Territories and two unions—some of whom appeared as interveners—to laws enacted by the Commonwealth Parliament.

In a joint judgment, Chief Justice Gleeson and Justices Gummow, Hayne, Heydon and Crennan held that under s.51(xx) of the Constitution the Commonwealth Parliament has power to make laws regulating the employment relations of what are known as constitutional corporations, that is, "Foreign, trading and financial corporations formed within the limits of the Commonwealth". Justices Kirby and Callinan delivered separate dissenting judgments.

In Justice Kirby's view, the effect of the majority's decision was "radically to reduce the application of State laws in many fields that, for more than a century, have been the subject of the States' principal governmental activities".[3] He said that:

> "… the unnuanced interpretation of the corporations power now embraced by a majority of this Court … has the potential greatly to alter the nation's federal balance … By this decision, the majority deals another serious blow to the federal character of the Australian Constitution".[4]

Professor Leslie Zines described the dissenting judgment of Justice Callinan as a full-blooded attack on the development of constitutional interpretation over the past 86 years:

> "He [Callinan J] expressed his disapproval of almost all the principles of interpretation expounded since 1920. The one exception is the principle in *Melbourne Corporation v. Commonwealth*, which, however, he interpreted more widely than anyone has yet done".[5]

Justice Callinan found that:

> "The reach of the corporations power, as validated by the majority, has the capacity to obliterate powers of the State hitherto unquestioned. This Act is an Act of unconstitutional spoliation".[6]

He observed:

> "The validation of the legislation would constitute an unacceptable distortion of the federal balance intended by the founders, accepted on many occasions as a relevant and vital reality by Justices of this Court".[7]

Justice Callinan concluded that:

> "There is nothing in the text or the 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…. The Court goes

beyond power if it reshapes the federation. By doing that it also subverts the sacred and exclusive role of the people to do so under s.128".[8]

Despite the views expressed in the dissenting judgments, it is fair to say that the result of this case was not unexpected in legal circles. At last year's Samuel Griffith Society Conference Stuart Wood delivered a paper[9] which set out what I might call the orthodox view among a substantial majority of legal practitioners who cared to comment about these matters in academic, legal and media fora. Stuart Wood said that in his view the constitutional challenge would fail, and cited 22 papers by 16 different authors to support his proposition.[10] Even George Williams, Labor's constitutional *consigliere*, observed in March, 2005:

"While the High Court has not finally settled upon the scope of this power, it appears wide enough to allow the federal Parliament to regulate the rights and entitlements of employees of corporations".[11]

And Stephen Smith, federal Labor's Workplace Relations spokesman, noted "the bulk of legal opinion seems to be that the Commonwealth does have a range of powers in this area".[12]

On the other hand, the High Court had never considered the specific question of whether the corporations power supports laws regulating the employment relations of corporations. Many of the Justices had not sat on cases dealing with any aspect of the corporations power.

The Labor States would have been aware of all of this. Precedent and the broad trend of constitutional interpretation favoured the Commonwealth. From the perspective of the States, the case would be important and the argument they would make would have to be creative and original.

What did the States say about the case when bringing it?

Rhetorically at least, the States seemed to suggest that the case was important if not fundamental to their existence.

Many of the State leaders spoke passionately of the challenge. NSW Premier Morris Iemma said, "We owe it to workers and their families to prosecute the case".[13] His Industrial Relations Minister John Della Bosca was more strident, and described it as "the most important High Court case since the Second World War … obviously the people of New South Wales will be expecting us to run this case … it's a very important case, and the cost is a very small cost given the significance of this".[14]

Victorian Premier Steve Bracks said:

"I think there is quite a deal at stake and that is sovereignty … This is a takeover by one level of government to [sic] another".[15]

He argued:

"We are obliged to test the legal underpinnings of the Howard Government's new laws, which rely on a new interpretation of our Federation…. [This is] also about whether Canberra should be allowed to unilaterally end the way our Federation works. This High Court challenge is a principled stand".[16]

His Attorney-General and Industrial Relations Minister, Rob Hulls, a man unencumbered by the usual protocols surrounding Attorneys-General, thundered:

"We've made it quite clear to the other States that we'll be part of the action…. It is important that we prepare our case thoroughly and appropriately…. We want to win this case".[17]

South Australian Premier Mike Rann said, "This is very serious for South Australia".[18] His Minister John Hill said that the cost was a "fairly modest amount when you consider what we are trying to protect…. We are doing it because we believe we have a chance of winning, not just making a political point".[19]

Peter Beattie was characteristically understated:

"The corporations power in the Constitution was never intended to be a Trojan horse to take over the States".[20]

"We'll challenge them in the High Court, and know we've got a fight on our hands".[21]

He indicated that:

"If the States lose, it will be the beginning of the end of States with their current powers, because I think it is a threat to Federation in its current form".[22]

Beattie's Industrial Relations Minister, Tom Barton said that his advice indicated that "to put the most forcible argument it is important that Queensland does mount its own case".[23]

The so-called Employment Protection Minister of Western Australia (an ironically named portfolio given that there have been three Ministers since the *Work Choices* challenge was launched less than two years ago), John Kobelke opined that Western Australians would "not have Canberra rule from the East…. What this is all about is trampling the States".[24] His Premier Alan Carpenter said:

> "The Commonwealth can't just come in and take away the responsibilities of State governments. Otherwise, we're going to end up just being an outpost of Canberra, and people have to think about that".[25]

He asked:

> "Should State governments have their constitutional … rights and responsibilities kicked aside by the Commonwealth at the whim of the Commonwealth? No".[26]

Even the Tasmanian Premier told the public that he had "a strong case".[27] And the unions' John Cahill declared: "This is one of the most important cases this Court will ever hear".[28]

Did the States' rhetoric match their arguments?

The rhetoric suggested the States would mount a bold and audacious attack on the use of the corporations power. The States had nothing to lose. On a political level, given Labor's distaste for the content of the laws, a victory for the States in the High Court would have been highly significant.

Constitutional litigation operates best when both parties act in their own institutional interest—when the Commonwealth seeks to pursue maximum power and when the States seek to confine Commonwealth power to the maximum extent possible. When States make concessions, these concessions not only increase the ability of the Commonwealth to encroach easily on the States' residual areas of power, but they also make the High Court's task harder as the Court may not hear, and may be therefore less able to test, the strongest argument against the proposition put by one party.

Furthermore, concessions in one case often come back to haunt the party who has made them. In the *Industrial Relations Act Case*[29] in 1996 Victoria, Western Australia and South Australia "conceded that s. 51(xx) empowered the Parliament to make laws governing the industrial rights and obligations of constitutional corporations".[30] In the same case New South Wales adopted the Commonwealth's submissions. Much was made of this by the Commonwealth in its submissions in *Work Choices.* As the majority held:

> "These concessions do not preclude the States from advancing the arguments made in the present case, but they draw attention to the fact that reliance on the corporations power to sustain parts of the new Act is not unprecedented".[31]

Given this history, one would have expected the States to avoid any semblance of concession.

There were two major precedents that presented obstacles to the States succeeding in the *Work Choices Case*: the *Engineers' Case*[32] and the *Concrete Pipes Case*.[33] The precedents set by these cases underpinned the Commonwealth's use of the corporations power. The former case stands for the proposition that s. 51 should not be interpreted "by reference to a presumption that certain subjects are reserved for the States".[34] In the latter case the High Court took a broader view of the corporations power, finding that the Commonwealth could regulate the trading activities of constitutional corporations even if their trading activities took place within the confines of one State's borders.

George Williams recognized this was the major issue. After judgment was delivered in the *Work Choices Case* he said:

> "For the States, the *Work Choices Case* was lost as far back as 1920. In that year the High Court in the *Engineers' Case* swept aside the earlier decisions and discarded any idea of a balance between federal and State power. This idea of federal balance, like States' rights, became a constitutional heresy. Today, they are nothing more than political slogans. Applied over decades, the *Engineers' Case* has led to a steady increase in Commonwealth power".[35]

In order to ventilate the range of possible arguments completely, and to avoid any unintended concessions, the States needed to challenge these decisions. But they did not, as the majority observed:

> "No party to these proceedings questioned the authority of the *Engineers' Case*, or the *Concrete Pipes Case*, or the validity of the *Trade Practices Act* in its application to the domestic (intra-State) trade of constitutional corporations. Necessarily, however, the plaintiffs experienced difficulty in accommodating their submissions to those developments".[36]

The Justices of the High Court might have made these observations for three reasons. The first is that they were merely reciting these points as a matter of record to state a factual position that these decisions were not challenged. Secondly, their Honours may have been indicating that their reasoning proceeds on the basis that these cases were not challenged. Finally, there may be some members of the majority who are flagging that these cases were not challenged because they may have been interested in entertaining arguments about their continuing authority. For each of the eight governments to have failed to provide the Court with an

opportunity to revisit these cases was a dereliction of duty on the part of the States and Territories.

Although the authority of the cases was not questioned, the majority made some observations about the *Engineers' Case*. They said:

> "It is important not to overstate either the propositions about constitutional construction applied in and after the *Engineers' Case* or the consequences of their adoption".[37]

Their Honours suggested that:

> "As Windeyer J rightly pointed out in the *Payroll Tax Case*, the *Engineers' Case* is not to be seen 'as the correction of antecedent errors or as the uprooting of heresy'. There is no doubt that, as he continued, '[t]o return today to the discarded theories would indeed be an error and the adoption of a heresy' ".[38]

The dissenting Justices' view of the construction of the Constitution led them to find that a challenge to the validity of the *Engineers' Case* was unnecessary. Justice Kirby found that the States' "argument can be upheld without doubting the validity of the general approach to the interpretation of the Constitution adopted by this Court in the *Engineers' Case*".[39]

Justice Callinan held that:

> "None of the plaintiffs here have contended, or need to contend for their argument to succeed, that the *Engineers' Case* should be overturned. That somewhat unsatisfactory case, an early instance of judicial activism, was concerned with, and rejected the doctrine of reserved powers".[40]

However, Justice Callinan thought that the *Engineers Case* was still binding:

> "No one in this case suggests that the *Engineers' Case* should be overruled, and indeed it must be accepted that the principles which it states, subject to some qualifications … are still binding".[41]

What makes Justice Callinan's decision particularly interesting is that he notes the persistent criticism of *Engineers'*. He argued that the *Engineers' Case* fails to take into account the policy of the Constitution, is at odds with modern purposive approaches to interpretation, misrepresented previous decisions, and has been subject to academic criticism. His Honour also cited, with approval, the dissent of Gavan Duffy J.[42]

His Honour has, in effect, outlined some of the criticisms of *Engineers'* that could and should have been vented by the States.

Before proceeding further let me concede that attempting to get the High Court to reconsider these long standing precedents would be neither easy nor necessarily successful. *Concrete Pipes* is a precedent of nearly 40 years standing, and the *Engineers' Case* has set the method of constitutional interpretation for almost 90 years.

Of course the High Court is not bound by its own precedents. However, in order to get the Court to reconsider these previous authorities the States would need to undertake the difficult task of applying the test set out in *John v. FCT*.[43]

The practical effect of reverting to pre-*Engineers' Case* jurisprudence would be revolutionary. It may cause something of a crisis for the Commonwealth. But this does not mean that the States—or at least one of the States—should not mount the argument. As the majority suggested, some of the arguments run by the States went close to conjuring up pre-*Engineers' Case* jurisprudence, especially argument that the corporations power was limited by the conciliation and arbitration power.

Why didn't the States run these arguments?

Modern approaches to litigation suggest that parties should only put their strongest arguments in submissions to the Court. It could be argued, however, that in constitutional litigation the position is a little different, especially where the stakes are as high as the States' rhetoric would suggest. This point is only magnified when so little was known about the individual views of most members of the Court to the interpretation of the corporations power. While I have conceded that to argue successfully against the validity of *Engineers'* or *Concrete Pipes* would be difficult, just because an argument is difficult does not mean that it is not worth making. It may have been less inexcusable not to have made these arguments where there was only one plaintiff appearing. But when ten entities—six of whom had very similar interests—appeared, not making the argument is more difficult to justify.

However, perhaps the main reason for the States' reluctance to run these arguments lies in the fact that they did not believe in their case. The challenge was more about politics than about constitutional law. In fact, the Labor States and the trade unions were always happy to cede the Commonwealth power over industrial relations.

In the week of the October, 2006 ACTU Congress, after the *Work Choices Case* was heard but still a few weeks before the judgment was delivered, ACTU Secretary, now ALP candidate, Greg Combet made a speech to the ACTU Congress and gave a series of media interviews. Combet said that, with relation to the *Work Choices Case*:

> "If the corporations power is available I want people to be under no misapprehension at all, we are going to support a future Labor government to use it".[44]

Similarly, in his speech to the ACTU Congress, having outlined a series of principles he wanted to see in legislation, Combet said:

> "To implement these principles in national industrial relations laws the policy supports the use of all of the constitutional powers that may be available to a Labor government, while recognising a continuing role for State systems. We are of course awaiting the High Court judgment, which we expect to identify the extent to which the corporations power of the Constitution can be relied upon to legislate industrial relations".[45]

Combet's statements confirm that the unions always wanted to see the corporations power used for industrial relations purposes. But that does not entirely explain the position of the States. Their position is better explained by a speech Kevin Rudd gave in April, 2007. Rudd, who had supported the States' challenge to *Work Choices*, now said:

> "We must recognise that business large and small is increasingly operating across State borders. Federal Labor's objective therefore is to create a uniform national industrial relations system for the private sector….".[46]

How do you think the State Premiers acted? Did they say, "this is Canberra ruling from the East"? Did they accuse Mr Rudd of taking the responsibility of the States? Did they protest that this was about whether Canberra should be allowed to unilaterally end the way our Federation works? Of course not. Showing "remarkable" intellectual consistency, Alan Carpenter, one of the greatest critics of John Howard's use of the Constitution to create a national industrial relations scheme, said:

> "Kevin Rudd is looking for a consistent system across the nation … and I'd be supportive of that balance".[47]

His new Employment Protection Minister, Michelle Roberts fell into line:

> "WA is but one State as part of this country … More and more, we are working towards a global economy, certainly it's part of a national economy. There are many national employers and we do need consistency from State to State. It seems to me to be nonsense to have widely varying workplace laws in each of the States and territories in Australia".[48]

The previously strident NSW Industrial Relations Minister, John Della Bosca became sanguine:

> "No one in any of the States, no one in the union movement and I don't think any employers want to go back to the old system … We want to go forward and support Kevin Rudd's view".[49]

These statements of cooperation, collaboration and capitulation essentially underscore the fact that the Labor States were never really serious about confining the Commonwealth's power. It is clear that Labor's High Court challenge was intellectually dishonest.

Further evidence of Labor's philosophical position is to be found in history. One of its great icons, and a key proponent of a Labor constitutional policy, E G Whitlam, as long ago as 1972, advocated the use of the corporations power for industrial relations purposes. He said:

> " … the applicability of this corporations power in the industrial sphere has, of course, yet to be tested. Nevertheless, it would appear probable that the Commonwealth could establish a system of registration of voluntary industrial agreements not simply on the basis of the conciliation and arbitration provision in the Constitution, but on the basis of the corporations power. In this historic High Court decision [i.e., the *Concrete Pipes Case*] could lie the seeds of a new dominance in our industrial affairs of a co-operative rather than an adversarial spirit …".[50]

Therefore it is in Labor's past, and in its future, that the real reason for its less than robust constitutional attack on *Work Choices* lies. Labor always wanted the Commonwealth to have the power over industrial relations.

What conclusions can be drawn about the States and the *Work Choices Case*?

After the High Court handed down its decision, Queensland Deputy Premier Anna Bligh was asked by ABC journalist Eleanor Hall, "Was it a mistake by the States to actually take this to the High Court?". Bligh replied:

"I don't believe so. We, as a State government, and I know this view was shared by others, took the view that we had to do everything in our power … I don't believe it was wrong for Queensland or for any of the other States to actively pursue every avenue to ensure the rights and protections of our citizens".[51]

But this is a mischaracterization of what the States did. They did not do "everything in their power". By failing to actively pursue the *Engineers'* and *Concrete Pipes* cases they effectively ran dead.

The effect of Labor's capitulation is not merely to expand Commonwealth power with relation to the regulation of corporations but, through the methodology endorsed by the majority and insufficiently challenged by the States, a further broad reading of Commonwealth powers may occur in other areas as well. Kevin Rudd and Steve Bracks may talk about reshaping the federation or making it work better, but when Labor had the chance to do so in the High Court it failed to take the opportunity. So when Mike Rann says, "[the] High Court decision fundamentally twists the Constitution and further undermines the role and powers of the States even though Australians weren't given a vote through a referendum",[52] he and the other State Premiers have only themselves to blame.

Clemenceau famously said: "War is too serious a matter to be left to the Generals". Experience shows that Federalism is too serious a matter to be left to the State Premiers.

Endnotes:

1. (2006) 81 ALJR 34.
2. *Ibid.*, 187 [689].
3. *Ibid.*, 154 [539].
4. *Ibid.*, 167-68 [611-612].
5. Leslie Zines, *The High Court and the Constitution in 2006* (Paper presented at the Gilbert +Tobin Centre for Public Law Constitutional Law Conference, Sydney, 16 February, 2007) (footnote omitted).
6. (2006) 81 ALJR 34, 221 [794].
7. *Ibid.*, 253 [913].
8. *Ibid.*, 214-215 [779] (footnote omitted).
9. Stuart Wood, *The High Court Chooses: Will* Work Choices *Work?* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 18 (2006), pp. 303-334.
10. *Ibid.*, pp. 327-330.
11. George Williams, *One-stop Industrial Relations: Coming soon to a workplace near you?* (2 March, 2005), Online Opinion <http://www.onlineopinion.com.au/view.asp?article=3084> at 16 August, 2007.
12. Stephen Smith, *Doorstop Interview* (7 February, 2006) <http://www.alp.org.au/media/0206/dsiirii080.php> at 16 August, 2007.
13. ABC Television, *High Court challenge against new IR laws begins*, *7.30 report,* 3 May, 2006, <http://www.abc. net.au/7.30/content/2006/s1630136.htm> at 16 August, 2007.
14. ABC Radio, *States vow to follow NSW IR challenge*, *PM,* 21 December, 2005, <http://www.abc.net.au/pm/content/ 2005/s1536035.htm> at 16 August, 2007.
15. AAP, *States, federal Govt gear up for High Court IR battle*, 4 May, 2006.

16. Steve Bracks, *Why we've gone to Court*, *The Age*, 9 May, 2006.

17. AAP, *Victoria promises to join IR challenge*, 8 February, 2006.

18. ABC Television, *High Court challenge against new IR Laws begins*, *loc. cit.*.

19. *State Politics—Estimates $50,000 bill for IR fight*, *The Advertiser*, 26 October, 2006.

20. Rosemary Odgers, *Beattie takes on IR laws*, *The Courier Mail*, 31 January, 2006.

21. ABC Television, *High Court challenge against new IR laws begins*, *loc. cit.*.

22. ABC Television, *High Court challenge begins against Govt's new IR laws*, *Lateline,* 4 May, 2006, <http://www.abc. net.au/lateline/content/2006/s1631132.htm> at 16 August, 2007.

23. ABC Radio, *States vow to follow NSW IR challenge*, *loc. cit.*.

24. John Kobelke, *WA to fight federal Government's extreme IR laws* (Press Release, 22 December, 2005).

25. ABC Television, *High Court challenge against new IR laws begins*, *loc. cit.*.

26. ABC Television, *High Court challenge begins against Govt's new IR laws*, *loc. cit.*.

27. ABC Television, *High Court challenge against new IR laws begins*, *loc. cit.*.

28. ABC Television, *High Court challenge begins against Govt's new IR laws*, *loc. cit.*.

29. *Victoria v. The Commonwealth* (1996) 187 CLR 416.

30. (2006) 81 ALJR 34, 59 [46].

31. *Ibid.*.

32. *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

33. *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

34. Andrew Stewart and George Williams, *Work Choices: What the High Court Said*, Federation Press, Sydney (2006) 43.

35. George Williams, *States on back foot over federal powers*, *The Courier Mail*, 16 November, 2006.

36. (2006) 81 ALJR 34, 60 [50].

37. *Ibid.*, 89 [190].

38. *Ibid.*, 90 [193].

39. *Ibid.*, 158 [557] per Kirby J.

40. *Ibid.*, 243-244 [885] per Callinan J.

41. *Ibid.*, 185 [682].

42. *Ibid.*, 203-206 [738-747] per Callinan J.

43. (1989) 166 CLR 417. *John* sets out four rules for overturning previous decisions of the High Court: "(i) do the earlier decisions rest upon a principle that is worked out in successive cases?; (ii) is there a difference in reasoning between the majority Justices in one of the earlier decisions?; (iii) has the earlier decision not achieved a useful result, but rather caused considerable inconvenience?; and (iv) have the earlier decisions been acted upon in such a manner as to militate against reconsidering?". See Gian Boeddu and Richard Haigh, *Terms of Convenience: Examining Constitutional Overrulings by The High Court*, [2003] Fed Law Rev 5, <http://www.austlii.org/au/ journals/FedLRev/2003/5.html> at 16 August, 2007.

44. Megan Shaw, *Unions back federal system*, *The Age*, 26 October, 2006.

45. Greg Combet, Speech delivered at the ACTU Congress, 24 October, 2006.

46. Kevin Rudd, *Facing the Future*, Speech delivered to the National Press Club, Parliament House, Canberra, 17 April, 2007.

47. Kim McDonald and Amanda Banks, *Premier agrees to Rudd's IR takeover*, *The West Australian*, 19 April, 2007.

48. *Ibid*..

49. AAP, *States and Commonwealth can work together on IR: Della Bosca*, 20 April, 2007.

50. E G Whitlam, *Address to the Metal Trades Industry Association*, 5 October, 1972, quoted by J L Webb, *Industrial Relations and the Contract of Employment* (1974) 97.

51. ABC Radio, *IR laws may be constitutional but still not fair*, Anna Bligh, *The World Today,* 14 November, 2006 <http://www.abc.net.au/worldtoday/content/2006/s1788191.htm> at 16 August, 2007.

52. *Stop the power grab says Rann*, *The Advertiser*, 16 November, 2006.